Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

FLYING J INC.,
Petitioner,

v.

KYLE KEETON,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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May, 2006

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QUESTION PRESENTED FOR REVIEW

Whether an employee suffers a tangible employment action for purposes of a sexual harassment claim when:

(a) he was laterally transferred to another location without demotion, any loss of salary, job responsibilities, benefits, or title; and,

(b) when he was hired he stated that he would relocate if necessary.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioner is Flying J Inc. ("Flying J"), which has no parent companies. No publicly held company owns 10% or more of the stock of Flying J. Flying J was the Defendant in the District Court and the Appellant in the Sixth Circuit Court of Appeals. Respondent herein is Kyle Keeton, who was Respondent in the courts below and is represented by R. Gary Winters of McCaslin, Imbus & McCaslin, Suite 900 Provident Building, 632 Vine Street, Cincinnati, Ohio 45202-2442.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Flying J Inc., respectfully petitions for a writ of certiorari, and an order vacating the judgment of the United States Court of Appeals for the Sixth Circuit, so that this case will be remanded to that court pending this Court's decision in *White v. Burlington Northern and Santa Fe Railroad Co.*, 364 F.3d 789 (6th Cir. 2005), *cert. granted*, 126 S.Ct 797 (Dec. 5, 2005) (No. 05-259).

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the Eastern District of Kentucky, in which it denied Flying J Inc.'s motion for judgment as a matter of law is unreported, and is reproduced in the Appendix to this Petition. (App. D1-D26). The Sixth Circuit's opinion is reported at 429 F.3d 259 (6th Cir. 2005), and is reproduced at App. C. (App. C1-C43). Following the decision of the Sixth Circuit, that Court denied a Rehearing *En Banc* in an unreported order that is reproduced at App. B. (App. B1-B2).

JURISDICTION

The Opinion of the Court of Appeals was entered on November 17, 2005. (App. C1-C43). A Petition for Rehearing *En Banc* was denied February 28, 2006. (App. B1-B2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

STATEMENT

1(a). In *White v. Burlington Northern and Santa Fe Railroad Co.*, 364 F.3d 789 (6th Cir. 2005), *cert. granted*, 126 S.Ct. 797 (Dec. 5, 2005) (No. 05-259), this Honorable Court recently heard arguments and currently is

reviewing the central issue of Flying J's case. The central issue in *White*, and also the case *sub judice* against Flying J, is whether a lateral transfer constitutes a tangible employment action so to hold an employer liable under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.* In *White*, the definition of tangible employment action is central to determining the employer's liability under a Title VII race discrimination claim. There, the Sixth Circuit found that where the plaintiff was assigned different duties within her job description that were more arduous, dirtier, and carried less prestige, there was an adverse employment action even though her pay remained the same. 364 F.3d at 803.

In the instant action, however, the decision below represents an even more compelling example of the conflict of authority regarding the, as yet unresolved, significant issue of federal employment law concerning what constitutes a tangible employment action. Specifically, whether an employee's lateral transfer that he agreed to when hired constitutes a tangible employment action when he suffered no demotion, loss of salary, benefits, title, duties, or prestige. Petitioner, Flying J Inc. ("Flying J"), requests permission to be heard on this issue. Thus, Flying

J requests that this Court issue a GVR Order, which equitably grants its writ, vacates the Sixth Circuit's ruling, and remands this cause requiring "such further proceedings to be had as may be just under the circumstances" and that comports with the decision to be rendered in *White*. *See* 28 U.S.C. § 2106. Specifically, Flying J requests that this Honorable Court issue a GVR Order regarding the Sixth Circuit Court of Appeals decision below that found that a lateral employment transfer without demotion, loss of salary, benefits, or title constituted an adverse employment action even where the employee stated when hired that he would relocate if necessary. Because a concrete interpretation of what constitutes a tangible employment action is pending in this Court that is potentially determinative of Flying J's cause, this Court should grant Certiorari *pro forma*, vacating the decision below and remanding the case for a disposition that comports with this Court's forthcoming ruling in *White*.

1(b). This Court framed the tangible employment action concept in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). That case concerned the issue of when an employer becomes vicariously liable for the sexual harassment committed by one of its supervisors. *Id.* at 765.

This Court held that when sexual harassment results in a tangible employment action, the employer is automatically liable. If the sexual harassment does not result in a tangible employment action, the employer can escape liability by proving an affirmative defense (that it exercised reasonable diligence to prevent and correct any harassing behavior and the employee failed to take advantage of the protective measures or failed to avoid harm otherwise). *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Ellerth*, 524 U.S. at 765.

In *Ellerth*, this Court explained that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. The Court further noted that a tangible employment action usually inflicts direct economic harm. *Id.* at 762. Still, the courts of appeal are split over when a transfer may be so adverse as to constitute a tangible employment action.

This Court's pronouncement in *Ellerth* partially relied on the Sixth Circuit's prior explanation in *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir.

1996), of what is necessary to set forth a "tangible employment action." Namely, a plaintiff must show that he suffered "a materially adverse change in the *terms of his employment*." *Kocsis*, 97 F.3d at 885-86 (emphasis added). A materially adverse change in the terms of one's employment exists when certain factors are present, such as a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *Id.* at 885-86 A change in employment conditions "must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Kocsis*, 97 F.3d at 886. An employee's subjective impressions as to the desirability of one position over another are not relevant. *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002); *see also Doe v. DeKalb County Sch. Dist.*, 145 F.3d 1441, 1448 (11th Cir. 1998) (finding no case in any circuit where a court relied explicitly on the subjective preferences of a plaintiff to hold that that plaintiff suffered an adverse employment action); *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999) (holding that "mere idiosyncrasies of personal preference

are not sufficient to state an injury"). *Cf. Haimovitz v. United States Dept. of Justice*, 720 F.Supp. 516, 526 (W.D. Ky 1989), *aff'd*, 902 F.2d 1560 (3rd Cir. 1990) (holding that the law "only addresses those business decisions which adversely affect one's employment opportunities").

The Sixth Circuit decision in *White*, which this Court is currently reviewing, reaffirmed the definition of tangible employment action espoused in *Kocsis*. 364 F.3d at 797. The Sixth Circuit further described *Kocsis* as the "seminal case for defining adverse employment action." *Id.* The Sixth Circuit, however, failed to follow its own direction from *Kocsis* in the case below. Instead, the court confused the issue by holding that a lateral transfer with no change in salary, benefits, responsibility or prestige and, therefore, no "materially adverse change" in the terms and conditions of employment, is a tangible employment action. (App. C2-C3).

The only issue in the instant action is whether the Respondent's lateral transfer constitutes a tangible employment action so as to render Flying J liable. The better argument is that lateral transfers such as this do not constitute a tangible employment action, and thus, this Court should grant certiorari to decide this case or at least

return the matter to the Sixth Circuit so that it may base its decision on what this Court decides in the *White* case now under consideration.

FACTS OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION BELOW

Flying J operates travel plazas throughout the country that cater to the interstate traveler. Each travel plaza has a restaurant, a convenience store, and a maintenance department. Respondent, Kyle Keeton, applied for employment as an associate manager in a Flying J restaurant. Mr. Keeton stated on his employment application that he was willing to relocate to other Flying J travel plazas. (App. C3). He agreed because he believed his chances for advancement at Flying J would increase based on his ability to relocate. For example, Mr. Keeton lived in Georgia when Flying J hired him, but agreed to relocate to train at a Tennessee location. *Id.*

Following his training, Mr. Keeton was assigned to the Walton, Kentucky Flying J location as an associate manager where his immediate supervisor was General Manager Judy Harrell. A few months later, Ms. Harrell began making sexual advances toward Mr. Keeton, which he rejected. *Id.*

On December 4, 2001, Ms. Harrell informed Mr. Keeton that his employment was terminated. (App. C4). The termination was rescinded later that day, and was changed to a two-week suspension, then a one-week suspension, and then finally, that same day of December 4, 2001, the discipline was rescinded altogether, and Mr. Keeton was transferred to the Cannonsburg, Kentucky travel plaza. *Id.* It took Mr. Keeton one week to move, and Flying J paid for his expenses in Cannonsburg while he looked for a place to live. *Id.* Mr. Keeton's transfer was a lateral transfer as Mr. Keeton became the associate manager in Cannonsburg, with the same salary and benefits and job responsibilities as before in Walton. *Id.* The only aspect of Mr. Keeton's job that changed was that he would move to, and be working in, a different town in the state of Kentucky.

Subsequently, Mr. Keeton filed suit against Flying J in the United States District Court for the Eastern District of Kentucky alleging sexual harassment, retaliation, and constructive discharge under Kentucky Revised Statute Chapter 344. (App. C5). Flying J's Motion for Summary Judgment was denied and the case proceeded to trial. *Id.* The jury found Flying J liable only for sexual harassment

resulting in a tangible employment action, and awarded Mr. Keeton $15,000 in compensatory damages for emotional suffering, but with no back pay. (App. E1). On April 28, 2004, the United States District Court for the Eastern District of Kentucky denied Flying J's timely Motion for Judgment as a Matter of Law and the entered Judgment against Flying J. *Id.* Flying J appealed the verdict to the Sixth Circuit Court of Appeals. (App. C2).

On November 17, 2005, a divided Sixth Circuit panel ruled that a reasonable jury could have decided that Mr. Keeton's job transfer was a tangible employment action. *Id.* Thus, the Panel affirmed the jury verdict in favor of Mr. Keeton finding Flying J liable for supervisory sexual harassment resulting in a tangible employment action. *Id.* The Panel concluded that Mr. Keeton's alleged termination was not a tangible employment action. *Id.*

The Sixth Circuit acknowledged that when Mr. Keeton transferred from an associate manager position in Walton, Kentucky, to an associate manager position in Cannonsburg, Kentucky (120 miles away), he maintained the same title, responsibilities, salary, and benefits of his job. (App. C4-C5). In fact, the panel conceded that the store location was the only difference in Mr. Keeton's two

positions, and that Mr. Keeton did not present any evidence that Cannonsburg was an objectively worse location than Walton. (App. C12). The Court further recognized that Mr. Keeton stated he was willing to relocate to other Flying J travel plazas on his employment application, and Mr. Keeton had transferred twice before during his employment with Flying J. (App. C12, C35). Notwithstanding the purely lateral nature of his transfer and the absence of any materially adverse change in the terms and conditions of Mr. Keeton's employment, the Sixth Circuit held that a reasonable jury could have decided that Mr. Keeton's transfer was a tangible employment action. (App. C2-C3). Flying J's Petition for Rehearing *En Banc* was denied. (App. B1-B2).

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari because: (1) an order granting certiorari, vacating the lower court's ruling, and remanding the matter is proper when a similar issue currently is under this Court's review so that Flying J may benefit from this Court's forthcoming decision; (2) there is a conflict among the courts of appeal regarding the necessary legal standard to show a tangible employment

action;[1] and (3) the Sixth Circuit's ruling below is not only contrary to this Court's precedent in *Ellerth*, but contrary to Sixth Circuit precedent set forth in *Kocsis* as well.

Accordingly, the ruling below demands correction, namely, that this Honorable Court issue a GVR Order directed to the Sixth Circuit for reconsideration of Flying J's case pending this Court's forthcoming clarification of a "tangible employment action" in *White*.

1(a). Flying J requests, and equity demands, an opportunity to benefit from this Court's pending decision in *White* because that decision is potentially determinative of Flying J's liability in the instant case. To allow a petitioner to remain procedurally alive, this Court regularly grants certiorari, vacates a lower court decision, and remands a case ("GVR," or "GVR Order"), when a pending postjudgment decision of the Supreme Court – such as this Court's current review of what constitutes a tangible employment action in *White* – casts doubt on the judgment rendered by a lower federal court concerning a federal question. *See Lawrence ex rel. Lawrence v. Chater*, 516

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[1] "The terms 'tangible employment action' and 'adverse employment action' are interchangeable. (App. C8 at footnote 1) (citing *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461 n. 5 (6th Cir. 2000)).

U.S. 163, 180 (1996) (Scalia, J., dissenting). A GVR or GVR Order essentially remands a cause to the lower court for disposition consistent with this Court's pending and subsequent ruling. *Id.* A GVR is proper in this case to alleviate the "'potential for unequal treatment' that is inherent in [the Court's] inability to grant plenary review of all cases raising similar issues." *Id.* at 167. In *Lawrence*, this Court stated:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

516 U.S. at 167.

A GVR Order is "neither an outright reversal nor an invitation to reverse . . ." *Gonzalez v. Justices of the Municipal Court of Boston*, 420 F.3d 5, 7 (1st Cir. 2005). The GVR Order does not constitute a final determination of the merits, but instead offers the lower court the benefit of

the intervening ruling to reconsider its decision. *Id.* This Court issues a GVR Order when it views an intervening case or precedent sufficiently important to, and even outcome determinative of, the proper disposition of the case below that reconsideration in light of the intervening decision is appropriate. *See, e.g., Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (finding that this Court's prior GVR Order indicated that the Court found the intervening case "sufficiently analogous and, perhaps, decisive to compel re-examination of the case"). It is not necessary that this Court conclusively determine that the case below *will* be materially affected by the intervening case or precedent, only that it *might* be materially affected. *See Lawrence*, 516 U.S. at 166-67; *see also Bush v. Lucas*, 647 F.2d 573, 575 (5th Cir. 1981) (noting that this Court merely "flagged" the case "as one upon which the intervening decision may have some bearing, but which the Court has not conclusively determined to be materially affected thereby").

Thus, in cases where a petitioner files an application for writ of certiorari that "involve[s] the same issue as a case on which certiorari has been granted and plenary review is being conducted," this Court regularly holds that

such cases "may be 'GVR'd' when the similar case is decided." *Lawrence*, 516 U.S. at 181 (Scalia, J., dissenting). A GVR is appropriate where, as here, there is a "*reasonable probability* that giving the lower court the opportunity to consider [the] point anew will alter the result." *Id.* at 171-172. Uncertainty is precisely the reason this Court will issue a GVR order. *Id.* at 172.

For instance, in *Exxon v. Youell*, 516 U.S. 801 (1995), this Court "GVR'd" a case concerning the liability of an insurer implicated in the Exxon Valdez disaster to the Second Circuit Court of Appeals in light of its decision in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). *Wilton* held that the district court should apply a discretionary, rather than an "exceptional circumstances" test when deciding whether to stay declaratory actions during parallel state court proceedings. Similarly, in *Kapoor v. United States*, 516 U.S. 801 (1995), the Court "GVR'd" a criminal conviction after deciding *United States v. Gaudin*, 515 U.S. 506 (1995), which held that the Constitution requires a district court to submit to a jury the question of materiality of defendant's false statements to a federal agency when materiality is an element of the crime with which defendant is charged. In each of the aforementioned cases, like this

case, appellants filed applications for writ of certiorari after this Court had heard oral arguments but before it rendered decisions in the cases involving similar issues.

1(b). Flying J's case below is more compelling than *White* regarding the tangible employment action issue. As this Court is aware, in *White*, the Sixth Circuit reaffirmed the definition of tangible employment action espoused in *Kocsis* and rejected a broader interpretation adopted by the EEOC. 364 F.3d at 797-800. The court determined that the plaintiff's job transfer from her forklift operator job to a standard track laborer job was an adverse employment action even though her pay remained the same because the new position was more arduous, dirtier and carried less prestige. *Id.* at 803. The Sixth Circuit considered these factors to be "indices . . . unique to the particular situation." *Id.* Flying J's case involves change even more minor than the slight change in job responsibilities and prestige of *White*.

In Flying J's case, the aspect of the plaintiff's job that changed was the location. (App. C3-C4). Mr. Keeton maintained the same title, responsibilities, salary, and benefits of his job. *Id.* Mr. Keeton's reassignment fell far short of a reassignment with "significantly different

responsibilities" or a "significant change in benefits" contemplated by the Supreme Court in *Ellerth*. 524 U.S. at 761. GVR is appropriate in this case because this Court currently is reviewing the same issue in *White* – namely, whether a lateral transfer or reassignment constitutes a tangible employment action when there is no demotion, loss of pay, benefits, title, or promotional opportunities. Accordingly, this Court should issue a GVR order because Mr. Keeton's job transfer will potentially *not* constitute a tangible employment action pending this Court's decision in *White*, and there is a reasonable probability that it will alter the result of the court below.

2(a). This Court is well aware of the circuit split that exists regarding the type of employment action sufficient to create employer liability under Title VII. This uncertainty creates confusion that prevents employers from acting decisively to correct or remedy potential Title VII violations. Specifically, a concrete determination of factors that constitute a tangible employment action is necessary so that national employers such as Flying J can properly respond to employee complaints and allegations without incurring liability.

2(b). Prior to its decision in *White*, the Sixth Circuit defined a tangible employment action as "a materially adverse change in the terms of employment." *Kocsis*, 97 F.3d at 885-86. Mere inconvenience, alteration in job responsibilities, and reassignments without salary or work hour changes did not ordinarily constitute adverse employment decisions. *Id.* The Fifth and Eighth Circuits adhere to an approach similar to the Sixth Circuit's former precedent.

The Fifth and Eighth Circuits generally impose liability only where there is an "ultimate employment decision" on the part of the employer. *See Hockman v. Westward Communications, LLC*, 122 F. App'x 734, 747 (5th Cir. 2004); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692-93 (8th Cir. 2004). An ultimate employment decision includes acts "such as hiring, granting leave, discharging, promoting, and compensating." *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995); *see also Hockman*, 122 F. App'x at 748 (holding that a purely lateral transfer – one where "the new position had the same job title, benefits, duties, and responsibilities as the old position – is not an ultimate employment decision); *see also Wooten v. St. Francis Med. Ctr.*, 108 F. App'x 888, 890-91 (5th Cir.

2004) (holding that an office move is not an adverse employment decision under the "ultimate employment decision" requirement). The Eighth Circuit, however, recently expanded its material adverse action definition to include "a material change in employment status – a reduction in title, salary, or benefits." *Box v. Principi*, 442 F.3d 692, 696 (8th Cir. 2006). The Tenth Circuit similarly requires a significant change in the employment status, such as hiring, firing, failing to promote, or reassignment with significantly different responsibilities. *Tapia v. City of Albuquerque*, No. 05-2028, 2006 WL 308267 (10th Cir. Feb. 10, 2006).

The Fourth and Eleventh Circuits have a second view that expressly rejects the ultimate employment decision requirement. The Fourth Circuit defines an "adverse employment action" in the context of retaliation as an action that affects "the terms, conditions, or benefits of employment," *Von Guten Maryland v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001), while the Eleventh Circuit defines "adverse employment decision" as one that substantially alters the "employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or

her status as an employee." *Gupta v. Fla. Bd. Of Regents*, 212 F.3d 571, 587 (11th Cir. 2000); *see also Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1233 (11th Cir. 2006) (requiring that the plaintiff "demonstrate some threshold of substantiality"). The Eleventh Circuit further adds an objectivity element to the requirement providing that, "an employee must show a serious and material change in the terms, conditions, or privileges of employment . . . as viewed by a reasonable person in the circumstances." *Weston-Brown v. Bank of America*, 167 F. App'x 76, 79 (11th Cir. 2006).

Finally, unlike the majority of the circuits that at least have commonality in focusing on the employer's actions, the Ninth Circuit instead focuses on the effects that the employer's action will have on the employee. Accordingly, the Ninth Circuit defines an adverse employment action as one that is "reasonably likely to deter employees from engaging in protected activity [under Title VII]" and has declared that such actions include, "lateral transfers, unfavorable job references, and changes in work schedules." *Ray v. Henderson*, 217 F.3d 1234, 1243 (10th Cir. 2000); *see also Little v. Windermere Relocation*, Inc., 301 F.3d 958, 970 (9th Cir. 2002) (holding that an

employer's reduction of an employee's monthly base salary from $3000 to $2000 after employee reported to employer that she was raped by employer's client was an adverse employment action that would support employee's retaliation claim under Title VII).

This confusion among the circuits necessarily leads to different outcomes on similar issues depending on where the case is litigated. Accordingly, employers with a national presence cannot implement a uniform policy to appropriately address employee complaints and allegations. This Court should grant this Petition and provide concrete guidance and uniformity as to the legal standard for a tangible employment action.

3(a). Sixth Circuit precedent mandates a finding that Mr. Keeton's lateral transfer did not constitute a tangible employment action. The Sixth Circuit's ruling below is not only contrary to this Court's precedent in *Ellerth*, but contrary to Sixth Circuit precedent set forth in *Kocsis* as well. Judge Gilman's dissent properly notes that the majority has "muddied the waters" regarding what constitutes a tangible employment action in the Sixth Circuit by holding that a lateral transfer with no change in salary, benefits, responsibility or prestige and, therefore, no

"materially adverse change" in the terms and conditions of employment, is a tangible employment action. (App. C17).

In *Kocsis*, the Sixth Circuit declared that a plaintiff must show that he suffered "a materially adverse change in the *terms of [his] employment.*" *Kocsis*, 97 F.3d at 885-86 (emphasis added). A material loss of benefits, a less distinguished title, significantly diminished material responsibilities, demotion accompanied by a decrease in wage or salary, termination of employment, or other indices that might be unique to a particular situation are factors that must be present to find a materially adverse change in the terms of one's employment. *Id.* at 886. A change in employment conditions "must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Id.*

Termination, demotion, and loss of benefits and job responsibilities are tangible employment actions because they are materially adverse. *Smith v. City of Salem, Ohio*, 369 F.3d 912, 922 (6th Cir. 2004); *Kocsis*, 97 F.3d at 886. Reassignments such as Mr. Keeton's lateral transfer without changes in salary, benefits, title or work hours do not constitute adverse employment actions absent a less

distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *Kocsis*, 97 F.3d at 886. It is well established that the Sixth Circuit uses an objective standard to evaluate whether an act rises to the adverse action level. *Strouss v. Mich. Dep't. of Corr.*, 250 F.3d 336, 342 (6th Cir. 2001). Indeed, an employee's subjective impressions as to the desirability of location over another are not relevant in the Sixth Circuit. *See, e.g., Policastro*, 297 F.3d at 539 (stating that plaintiff's subjective displeasure over defendant's restructuring was not evidence of adverse employment action).

In the case below, the court failed illustrate any employment status change that would support a finding that Mr. Keeton's transfer was a tangible employment action as that term is defined under the law of the Sixth Circuit. Mr. Keeton maintained the same title, responsibilities, salary, and job benefits following his transfer. (App. C4-C5). The only change was in location from Flying J's Walton, Kentucky travel plaza to Flying J's Cannonsburg, Kentucky travel plaza – a factor that alone cannot transform Mr. Keeton's lateral transfer into a tangible employment action.

3(b). A change in job location alone cannot create a tangible employment action. Where the only difference in a job transfer is location requiring a commute, there is no adverse action. *Cf. Policastro*, 297 F.3d 535 (rejecting plaintiff's claim that she suffered an adverse employment action when her employer required her to travel to cities 80 to 100 miles from her home more frequently than her job previously required). In *Policastro*, like the case below, the reassignment did not involve a reduction in salary, a decrease in benefits, a diminution in responsibilities or a modification of title. *Id.* at 540. Additionally, the Court noted that the plaintiff had the option of spending the night if she preferred not to drive each day. In light of these factors, the court found that a reasonable person would not find the working conditions objectively intolerable. The court below, however, ignored this prior ruling and the fact that Mr. Keeton *moved* to Cannonsburg, and no commute was involved. (App. C4) (emphasis added).

The Sixth Circuit argues that the Decision below does not hold that a lengthy or even burdensome commute is, *per se*, an adverse employment action. (App. C15 at footnote 2). On the contrary, that is precisely the holding of the Sixth Circuit below. The court fully acknowledged

that the only difference in Mr. Keeton's two positions was location, and that Mr. Keeton did not present any evidence that Cannonsburg was an objectively worse location than Walton. (App. C12). Thus, because location was the only change in Mr. Keeton's employment status, the court below has contradicted its own and this Court's precedent.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and this Honorable Court should issue a GVR Order vacating the judgment of the United States Court of Appeals for the Sixth Circuit, so that this case will be remanded to that court pending this Court's decision in *White*.

Respectfully submitted this 30th day of May 2006.

Robert B. Worley, Jr.
JONES, WALKER, WAECHTER,
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201 St. Charles Avenue
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Telephone: (504) 582 8192
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Counsel for Petitioner Flying J Inc.

APPENDIX

SIXTH CIRCUIT:

Mandate,
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Order Denying Petition for Rehearing,
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Trial Minutes [Day One],
filed 04/27/04 ..... G1 - G2

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

04-6023

Filed: March 8, 2006

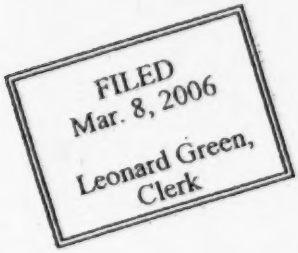
KYLE KEETON,

Plaintiff - Appellee,

v.

FLYING J INC.,

Defendant - Appellant.



MANDATE

Pursuant to the court's disposition that was filed 11/17/05 the mandate for this case hereby issues today.

A True Copy.

COSTS:

Filing Fee . . . . . $
Printing . . . . . $

Total . . . . . $

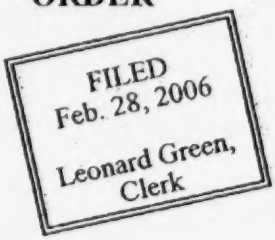
Attest:

/s/ Audrey Crockett
Deputy Clerk

No. 04-6023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KYLE KEETON,	)	
	)	
Plaintiff - Appellee,	)	
v.	)	**ORDER**
	)	
FLYING J INC.,	)	
	)	
Defendant - Appellant.	)	



BEFORE: GUY, BATCHELDER, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is

denied. Judge Gilman would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

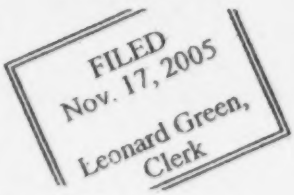
/s/ Leonard Green
Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 05a0443p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KYLE KEETON,	)	
	)	
Plaintiff - Appellee,	)	
v.	)	**No. 04-6023**
	)	
FLYING J INC.,	)	
	)	
Defendant - Appellant.	)	



Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
No. 02-00269—J. Gregory Wehrman, Magistrate Judge.

Argued: September 15, 2005

Decided and Filed: November 17, 2005

Before: GUY, BATCHELDER,
and GILMAN, Circuit Judges

COUNSEL

ARGUED: Robert B. Worley, Jr., JONES, WALKER, WAECHTER, POITEVENT, CARRETE & DENEGRE,

New Orleans, Louisiana, for Appellant. R. Gary Winters, McCASLIN, IMBUS & McCASLIN, Cincinnati, Ohio, for Appellee. **ON BRIEF:** Robert B. Worley, Jr., Shelley M. Sullivan, JONES, WALKER, WAECHTER, POITEVENT, CARRETE & DENEGRE, New Orleans, Louisiana, for Appellant. R. Gary Winters, McCASLIN, IMBUS & McCASLIN, Cincinnati, Ohio, for Appellee.

GUY, J., delivered the opinion of the court, in which BATCHELDER, J., joined. GILMAN, J. (pp. [illegible]3), delivered a separate dissenting opinion.

OPINION

RALPH B. GUY, JR. In this sexual harassment case, defendant Flying J, Inc. appeals from a jury verdict finding it liable for supervisory sexual harassment resulting in a tangible employment action. Flying J argues that there was no tangible employment action when it fired but then re-hired plaintiff Kyle Keeton the same day and when it laterally transferred Keeton to a different location. For the reasons explained below, we conclude that the termination was not a tangible employment action but that a reasonable

jury could have decided that the transfer was a tangible employment action. Accordingly, we **AFFIRM.**

I.

Flying J operates travel plazas that cater to interstate travelers. Each plaza has a restaurant. Kyle Keeton applied to be an assistant restaurant manager at a Flying J plaza. On his employment application, he stated that he was willing to relocate to other Flying J travel plazas. Keeton agreed because he believed that relocation would increase his chances for advancement. Keeton lived in Georgia when Flying J hired him, but he agreed to relocate to Tennessee for training.

After he completed his training in June of 2001, Flying J assigned Keeton to work as an associate manager at the Walton, Kentucky plaza. Flying J orally committed to keep Keeton at the Walton store for five years. Judy Harrell was the General Manager and his immediate supervisor. In September, Harrell began making several sexual advances toward Keeton, which he rejected.

Even though Keeton was not scheduled to work on December 4, 2001, Harrell called him at home and asked him to come to the restaurant so that she could speak to him

in person. When Keeton arrived at the restaurant, Harrell told him that he was fired, explaining, "you're not supporting me." Prior to this meeting, Harrell had never disciplined Keeton formally or informally, had not criticized him at all during management meetings, and Keeton had no warning that his job was in jeopardy. After the meeting, an assistant manager escorted Keeton from the building.

Keeton returned home and phoned Jamal Abdalla. Abdalla had been the manager of the district encompassing Walton when Keeton was hired, but in December of 2001, Abdalla was the district manager of another district that included Cannonsburg, Kentucky, a town 120 miles away from Walton. Keeton told Abdalla about the termination and that he thought it resulted from sexual harassment. Abdalla called Keeton back about one-and-a-half hours later and told him that he could maintain his position as associate manager if he transferred to Cannonsburg. Later that same day, his termination was formally changed to a two-week suspension, then a one-week suspension, then "to however fast [Keeton] could get over to Cannonsburg." Abdalla told him that he was being "reinstated." It took Keeton one week to move to Cannonsburg, and he was paid

for that week. Keeton maintained the same title, responsibilities, salary, and benefits in Cannonsburg that he had in Walton. Keeton's wife could not move with him to Cannonsburg because of a debilitating back problem that resulted in serious surgery. While he was working in Cannonsburg, Keeton maintained two residences—one for himself and one for his wife. Keeton worked at the Cannonsburg Flying J restaurant until mid-January, when he left for a position with another restaurant chain.

Keeton filed this lawsuit against Flying J for sexual harassment, retaliation, and constructive discharge under Title VII and Kentucky Revised Statute Chapter 344. Keeton alleges that he suffered from sexual harassment resulting in a tangible employment action, or alternatively that he suffered from sexual harassment resulting in a hostile work environment. The district court rejected Flying J's motion for summary judgment. The parties then consented to the jurisdiction of a magistrate judge for the jury trial. Flying J moved for judgment as a matter of law after Keeton presented his case to the jury and again after it presented its defense, but the magistrate judge denied the motions.

The jury found Flying J liable only for sexual harassment resulting in a tangible employment action. Following the format of the verdict form, the jury did not answer the interrogatory regarding sexual harassment with no tangible employment action. The jury answered "no" to the interrogatories asking if Flying J was liable for retaliation or if Keeton was constructively discharged. The jury awarded Keeton $15,000 in compensatory damages for emotional suffering, but with no back pay. Flying J renewed its motion for judgment as a matter of law on the grounds that Keeton had failed to produce evidence that he suffered a tangible employment action, but the court again denied the motion. Pursuant to 42 U.S.C. § 2000e-5, the trial court awarded Keeton attorney fees and costs of $36,573.86 as the prevailing party.

II.

We review *de novo* a district court's denial of judgment as a matter of law. *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 794 (6th Cir. 2004) (en banc), *petition for cert. filed*, (U.S. Aug. 24, 2005) (No. 05-259). "In determining whether a motion should have been granted, we must review the entire record, we 'must draw all reasonable inferences in favor of the nonmoving party,

and [we] may not make credibility determinations or weigh the evidence.'" *McCombs v. Meijer, Inc.*, 395 F.3d 346, 352 (6th Cir. 2005) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). Judgment as a matter of law is appropriate where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." FED. R. CIV. P. 50(a)(1).

Sexual harassment claims under the Kentucky Civil Rights Act and Title VII are analyzed in the same manner. *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 347 (6th Cir. 2005). An employer's liability for supervisory sexual harassment depends on the consequences of the supervisor's actions. If proven sexual harassment by the supervisor did not result in a tangible employment action, then the employer may not be liable if it engaged in preventative or corrective measures and the plaintiff unreasonably failed to utilize the measures the employer provided. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). If the sexual harassment did result in a tangible employment action, the employer will be strictly liable for the supervisor's sexual harassment. *Ellerth*, 524

U.S. at 762-63; *Clark*, 400 F.3d at 349 n.l. "When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Ellerth*, 524 U.S. at 753-54. The *Ellerth* court defined a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Accordingly, we have stated that an employment action must be materially adverse for an employer to be strictly liable for sexual harassment. *Kocsis v. Multi-Care Mgmt. Inc.*, 97 F.3d 876, 886 (6th Cir. 1996).[1]

The jury found that Harrell sexually harassed Keeton and that the harassment resulted in a tangible employment action. Flying J argues on appeal that the termination was not a tangible employment action because

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[1] The terms "tangible employment action" and "adverse employment action" are interchangeable. *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461 n.5 (6th Cir. 2000).

it was too temporary, and that the transfer was not a tangible employment action because it was lateral.

A. The Termination

We have decided that when an employer imposes an employment action that would be an adverse employment action but then quickly reverses the action, the employee has not suffered an adverse employment action. *Birch v. Cuyahoga County Probate Court*, 392 F.3d 151 (6th Cir. 2004); *Bowman v. Shawnee State Univ.*, 220 F.3d 456 (6th Cir. 2000). In *Birch*, a probate court magistrate sued for race and sex discrimination under Title VII and the Ohio civil rights statute. At a meeting with the presiding judge after she complained about unequal pay, the presiding judge told her that he would not like her to be a magistrate any longer. *Birch*, 392 F.3d. at 156. When the plaintiff asked if she was being fired, the judge told her that she was not. *Id.* The plaintiff argued that his comment was a termination and that it was an adverse employment action under Title VII. *Id.* at 169. We concluded that the presiding judge's remarks did not amount to an adverse action because, even if she was terminated for a moment, there was no real change in her employment status. *Id.*

Likewise, in *Bowman* we determined that a temporary removal of responsibilities was not an adverse action. There, the plaintiff had been an instructor and the Coordinator of Sports Studies at a university, and he alleged that his supervisor, a woman, sexually harassed him, ultimately resulting in her removing him as Coordinator. 220 F.3d at 459-60. Ten days later, he was restored to his previous position and the termination letter was removed from his file. *Id.* We held that "[e]ven if we assume that the loss of the Coordinator position constitutes a significant change in employment status, there is no tangible employment action in this case because the very temporary nature of the employment action in question makes it a non-materially adverse employment action." *Id.* at 462. Other courts have also held that when an otherwise adverse employment action is rescinded before the employee suffers a tangible harm, the employee has not suffered an adverse employment action. *See Pennington* v. *City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001) (and cases collected therein). Therefore, the only reasonable conclusion the jury could have reached in this case is that Keeton's termination lasting only hours was not a tangible employment action.

B. The Transfer

Flying J maintains that a transfer without a change in status, benefits, or salary is not a tangible employment action. We have held that "reassignments without salary or work hour changes do not *ordinarily* constitute adverse employment decisions in employment discrimination claims." *Kocsis*, 97 F.3d at 885 (emphasis added). In *Kocsis,* a nursing supervisor was reassigned as a unit nurse. There was no evidence that the new position held less prestige, earned a lower salary, demanded worse hours, or entitled her to any difference in employment related benefits of any kind. *Id.* at 886-87. Therefore, we concluded that the reassignment was not an adverse action. *Id.* In *White*, a female railroad employee sued her employer for sex discrimination. After she had complained about sexual harassment committed by her immediate supervisor, she was removed from her forklift position and reassigned to a track laborer position. 364 F.3d at 792. Her pay and benefits were the same, but the job was dirtier, more labor intensive, more difficult, required fewer qualifications, and was considered a worse job by the other employees. *Id.* at 793. We concluded that even though there was no loss in salary or benefits, the factors listed above were unique to

the plaintiff's situation and rendered the transfer a demotion. *Id.* at 803.

In this case, Keeton's responsibilities in Cannonsburg were not different from his responsibilities in Walton. The only difference between the two positions was location, and Keeton did not present any evidence that Cannonsburg was objectively a worse location than Walton. Cannonsburg was, however, a substantial distance from Walton. Defendant correctly points out that *Koscis* and *White* focus on the differences in job duties and not other impacts on the employee. We have not precluded consideration of such factors as commuting distance or relocation, however. In *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535 (6th Cir. 2002), we explicitly stated that increased distance to a work site can amount to a constructive discharge. There, the plaintiff was a sales agent living in the Cincinnati area. *Id.* at 537. Her sales territory included Louisville and Lexington, Kentucky, which were one hundred miles and eighty miles, respectively, from her home. *Id.* The Louisville/Lexington region comprised about forty percent of her sales, and she was required to be physically in the Louisville/Lexington region four to six days per month. *Id.* She was assigned to

work the Louisville/Lexington areas exclusively following a corporate restructuring, and she was expected to be physically present there four days per week. *Id.* She was not required to relocate and chose not to, commuting instead and spending three nights per week in Kentucky. *Id.* She did not experience any change in salary, benefits, diminution in responsibilities, or a modification of her title, and the reassignment was expected to advance her career. *Id.* at 539. She was unhappy with the change and resigned about ten months later. *Id.* at 538. She sued her employer for sex and age discrimination, claiming that the reassignment amounted to a constructive discharge. *Id.*

We held that the reassignment was not objectively intolerable and therefore was not a constructive discharge because "[t]he only aspect of her job that changed was that she was required to spend her time solely in Kentucky rather than splitting her time with the Cincinnati market The distance Policastro had to travel did not increase, although the number of times per month that she had to travel that distance did." *Id.* at 539. Flying J places importance on our statement that "[a]n employee's subjective impressions as to the desirability of one position over another are not relevant" to the decision of whether an

employee was constructively discharged. *Id.* Flying J maintains that a dislike of a long commute or relocation is an example of the subjective desirability of a position to the employee and we therefore should disregard Keeton's dislike of his new location. The very next sentence after the one quoted directly above, however, is: "We note that increased distance from home to a new position is a factor in determining whether a constructive discharge has occurred." *Id.* If dislike of increased commute or relocation for a new position merely represents the subjective taste of the employee, then we would not have expressly stated that increased distance is a relevant consideration. We have also considered commute distance in other decisions. In *Akers* v. *Alvey*, 338 F.3d 491 (6th Cir. 2003), a state employee who complained about sexual harassment was transferred to a different county's office. We decided that the transfer was not an adverse employment action because there was no significant change in her pay or duties, and "the transfer actually reduced Aker's round[-]trip commute from her home by 60 miles per day." *Id.* at 498. We have also affirmed an Eastern District of Kentucky decision that held in the constructive discharge context, a lateral transfer with an added twenty minutes of commute time did not

constitute a constructive discharge. *Darnell v. Campbell County Fiscal Court*, 731 F. Supp. 1309 (E.D. Ky. 1990), *aff'd*, 924 F.2d 1057 (6th Cir. 1991). The district court admitted that "transfer over a great distance can amount to a constructive discharge." *Id.* at 1313, citing *Christensen v. Equitable Life Assurance Soc'y*, 767 F.2d 340, 343 (7th Cir. 1985). Although much of our case law focuses on transfers in the context of the plaintiff's effort to demonstrate a constructive discharge, we have not precluded the possibility that a transfer not rising to the level of a constructive discharge might nonetheless constitute a tangible employment action. *See Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (noting that "other indices that might be unique to a particular situation" can turn what would ordinarily not be an adverse employment action into one). While this jury found that Keeton was not constructively discharged, it could reasonably have found that Keeton's transfer, which increased his commute to the extent that he needed to consider relocation, was an adverse employment action.[2]

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[2] Because of the nature of the argument offered in the dissent, it is important to emphasize that we are not holding that a lengthy or even burdensome commute is, *per se*, an adverse employment action. We merely hold that here, it was an appropriate factor for the jury to consider given the particular facts of this case.

Flying J also argues that the transfer could not have been an adverse employment action for two additional reasons: Keeton had agreed to relocate on his employment application, and Keeton did not seek damages incurred by the transfer. Keeton's employment application does not negate the transfer's impact on Keeton because when he agreed to be transferred, he did so with the understanding that a transfer would be for advancement within the company and not as a result of unlawful sexual harassment Moreover, defendant's position that Keeton did not seek damages because of the transfer is disingenuous. It is based on Keeton's trial testimony during cross-examination in response to the following question: "And you're not claiming any damages, money damages, in this case because you were moved from Walton within five years now, are you?" Keeton answered "no." The question inquired as to whether Keeton was pursuing a claim for defendant's failure to honor its oral commitment to keep Keeton in Walton for five years, not whether Keeton incurred any damages because of the transfer. Flying J's only ground for reversal was that the jury improperly found a tangible employment action. Having determined that the

jury could have reasonably concluded that Keeton suffered an adverse employment action, we **AFFIRM.**

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. Just last year, in *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789, 791 (6th Cir. 2004) (en banc), this court granted a rehearing en banc to clarify the proper inquiry for determining whether the victim of alleged discriminatory conduct has suffered an adverse employment action. The comprehensive opinion traced the history of the adverse-employment-action requirement, rejected a definition proposed by the EEOC and adopted by the Ninth Circuit, and instead reaffirmed a definition that this court had previously utilized. *Id.* at 795-800. Under that definition, a plaintiff seeking relief under Title VII must demonstrate "a materially adverse change in the terms of her employment." *Id.* at 797 (citations omitted).

I believe that the majority has now muddied the waters that *White* had clarified, swayed by Keeton's sympathetic family situation and isolated dicta from cases whose actual holdings contradict the conclusion that the

majority reaches. Having injected Keeton's particular personal circumstances into the adverse-employment-action analysis, the majority takes up an argument that Keeton himself had abandoned and proceeds to hold what no court in or outside of this circuit ever has: that a purely lateral transfer that carries with it no change in salary, benefits, responsibilities, or prestige is an adverse employment action when undertaken as a solution to a supervisor's discriminatory conduct. Because I believe that *White* and the caselaw leading up to it call for a result contrary to the one reached by the majority today, I would reverse the decision below and remand the case to the district court with instructions to grant judgment as a matter of law in favor of Flying J. I therefore respectfully dissent.

I. TERMINATION AND IMMEDIATE REINSTATEMENT

I agree with the majority that an employee who is illegally discharged, but who secures immediate reinstatement without the loss of any benefits, has not suffered an "adverse employment action" for purposes of the federal anti-discrimination laws. Maj. Op. at 3-4. Starting with the decision in *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 187 (6th Cir. 1992), this court has

recognized a de minimis exception to the general rule that an adverse employment action following discriminatory conduct gives rise to employer liability under Title VII. The plaintiff in *Kauffman* was a female machine operator who took medical leave to undergo breast enhancement surgery, and who was harassed by her male supervisor upon returning to work. When she told her supervisor that she had had "enough" of his overtures, he briefly assigned her to a manual machine that was difficult to operate and that was called "torture" by other employees. This court rejected the company's argument that an adverse employment action must be economic in nature, but remanded the case to the district court because the one-day transfer might fall into "a *de minimis* exception for temporary actions, such as ... where further remedial action is moot and no economic loss occurred." *Id.* at 187.

Our decision in *Bowman v. Shawnee State University*, 220 F.3d 456, 462 (6th Cir. 2000), on which the majority properly relies, is an on-point application of the principle first articulated in *Kaufmann*. The plaintiff in *Bowman* was the Coordinator of Sports Studies at a university, and he claimed that a female dean had stripped him of his duties as Coordinator after he resisted her sexual

advances. Ten days after the dean's actions, however, the school provost rescinded the dean's decision and removed the termination letter from Bowman's personnel file. This court held that the ten-day removal from the Coordinator position, with no loss in salary or benefits, was "properly characterized as a de minimis employment action that does not rise to the level of a materially adverse employment decision." *Id.* Although the loss of Coordinator responsibilities might be "materially adverse if permanent," the court said that the "very temporary" nature of the action placed it within the de minimis exception carved out by *Kauffman*. 220 F.3d at 462.

The majority, therefore, correctly concludes that *Bowman* disposes of Keeton's argument that a temporary termination, even if followed by immediate reinstatement, comprises an adverse employment action. Our unanimous conclusion on this point should, in my opinion, end our review of the present case because the "termination theory" of liability is the only one that Keeton advanced in his appellate brief. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005) (stating the general rule that "failure to raise an argument in [an] appellate brief

constitutes a waiver of the argument on appeal") (citation omitted).

But instead of deciding the present case on "the best and narrowest ground available," *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring in the judgment), the majority reaches out and affirms the jury verdict on the basis of a theory that even Kecton does not defend. This theory of liability—that a purely lateral transfer can constitute an adverse employment action when undertaken as a solution to a supervisor's unlawful conduct—departs from existing caselaw and the policies underlying Title VII.

II. LATERAL TRANSFER

I begin with this court's recent en banc decision in *White*, where the court reaffirmed that, "[i]n this circuit, *Kocsis* [97 F.3d 876 (6th Cir. 1996)] is the seminal case for defining [an] adverse employment action." *White*, 364 F.3d at 797. The Supreme Court relied in part on *Kocsis* in describing an adverse (or tangible) employment action as "a significant change in *employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant

change in benefits." *Id.* at 798 (citing *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998) (emphasis added)).

Kocsis provides guidance beyond the Supreme Court's brief description in *Burlington Industries*. The *Kocsis* court looked to cases from the Seventh Circuit and joined that circuit in concluding that victims of prohibited discrimination must prove that they have "suffered a *materially adverse* change in the terms or conditions of [their] employment because of [their] employer's conduct." *Koscis*, 97 F.3d at 885 (citing *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 885 (7th Cir. 1989)) (emphasis in original). Although outright termination is a "materially adverse change," reassignments without salary or schedule changes do not constitute adverse employment actions unless they carry with them "a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Koscis,* 97 F.3d at 886 (citing *Crady v. Liberty Nat'l Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)). These business decisions "may" be adverse employment actions, *White*, 364 F.3d at 797, but only if they are "more disruptive than a mere inconvenience or an alteration of job

responsibilities." *Kocsis*, 97 F.3d at 886 (citing *Crady*, 993 F.2d at 136).

The *Kocsis* court borrowed extensively from the Seventh Circuit's decision in *Spring*. There, a school principal was transferred to a new position farther away from her home. She sued the school board under the Age Discrimination in Employment Act (ADEA), alleging that she had been transferred on account of her age. *Spring*, 865 F.2d at 885-86. Observing that "the only negative aspect of Spring's new job assignment was that she would have to travel farther from home to get to work," *id.* at 886, the Seventh Circuit held that Spring had not suffered an adverse employment action. Increased commute time alone did not suffice to show a "materially adverse change in the terms and conditions of [Spring's] employment." *Id.*

Another ADEA case in the educational area makes the same point. In *Sanchez v. Denver Public Schools*, 164 F.3d 527 (10th Cir. 1998), a longtime school teacher was transferred to a different elementary school when enrollment at her current school declined. The location of the new school increased Sanchez's commute time from between five and seven minutes to between thirty and forty minutes. *Id.* at 532. Sanchez sued the school district under

Title VII and the ADEA, alleging that she had been transferred because of her age and her gender. In affirming the grant of summary judgment in favor of the school district, the Tenth Circuit emphasized that Sanchez's "salary and benefits remained the same," that she retained the same job and responsibilities, and that neither the increased commute time nor other "special circumstances" demonstrated that "this employment action was anything beyond a mere inconvenience or alteration of responsibilities." *Id.*

Similarly, the 120-mile transfer in the present case did not alter the terms or conditions of Keeton's employment at Flying J. He retained his status and responsibilities as an assistant manager and continued to enjoy the same salary and benefits that he had received prior to the transfer. The new job was, as the magistrate judge described it, "virtually identical to his [previous] position in Walton, Kentucky." Because the transfer left Keeton's "employment status" unaltered, *Burlington Industries*, 542 U.S. at 761, he simply did not suffer an adverse employment action.

What must drive the majority's contrary conclusion, then, is one of two theories, both of which are unsupported

by existing law. One theory rests on the fact that the distance of Keeton's transfer was greater than that of the transfers in cases like *Spring* and *Sanchez*, cases the majority does not even cite. The second theory stems from the majority's apparent belief that Flying J's solution to the discriminatory conduct of Keeton's supervisor, combined with Keeton's own personal circumstances, convert an otherwise permissible employment decision into an adverse one. These two theories will be addressed in turn.

A. A longer commute does not constitute a material change in the terms or conditions of employment

First, the principle that the majority appears to adopt-that employment decisions increasing commute time can, in and of themselves, be materially adverse if undertaken as a solution to a supervisor's discriminatory conduct-has little basis in our caselaw. As the majority acknowledges, none of our cases has ever found that increased commute time, standing alone, transforms an otherwise lawful lateral transfer into an adverse employment action.

This court, for example, affirmed a district court opinion holding that an increase of 20 minutes in commute

time amounted to neither a constructive discharge nor an adverse employment action. *Darnell v. Campbell County Fiscal Court*, 731 F. Supp. 1309, 1313 (B.D. Ky. 1990), *aff'd*, 924 F.2d 1057 (6th Cir. 1991) (unpublished). More recently, in *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002), this court rejected a plaintiffs claim that she suffered an adverse employment action when her employer required her to travel to cities 80 and 100 miles from her home four days per week, instead of four days per month. The *Policastro* court refused to rely on the plaintiffs "subjective displeasure" over the airline's business decisions, instead concluding that the increased travel time each month did not render the terms or conditions of her employment "objectively intolerable." *Id.*

Two unpublished cases from this circuit add to the steady stream of authorities holding that increased travel time is insufficient to render a transfer an adverse employment action. One is *Nelson v. General Electric Company*, No. 99-4043, 2 F. App'x 425, 432-33 (6th Cir. Jan. 17, 2001) (unpublished), where the company was reducing its staff at one facility and offered the plaintiff a position at another. The new position would have required her to commute 60 miles to work each day. This court held

"that a longer commute with the same job title, salary, and benefits is not an adverse employment action." *Id.* at 433. In the other case, an interviewer at a public defender's office in Ohio was transferred from the adult division to the juvenile division, requiring her to spend additional time driving between county buildings. *Smith v. County of Hamilton*, No. 00-4290, 34 F. App'x 450, 455-56 (6th Cir. April 19, 2002) (unpublished). This court again relied on *Darnell* and held that the increased travel time did "not amount to a materially adverse change." *Id.* at 456.

Beyond lacking support in the caselaw, the majority's disposition suffers from subjective line-drawing problems. This disposition is inconsistent with prior cases that examine the effect of an employment decision on a "reasonable person." *See Policastro*, 297 F.3d at 539. If a 20-minute increase in daily commute time, an extra 100 miles of driving on 12 additional days per month, and a 60-mile increase in a daily commute are not "objectively intolerable" changes in the terms and conditions of employment, what makes the 120-mile transfer in the present case an adverse employment action? *See Darnell*, 731 F. Supp. at 1313; *Policastro*, 297 F.3d at 538. And if the transfer had been to a location, say, 40 miles away,

would the change in Keeton's employment status still be "materially adverse"? *Kocsis*, 97 F.3d at 885; *see Sanchez*, 164 F.3d at 532 (finding no adverse employment action despite a potential 35-minute increase in commuting time); *Spring*, 865 F.2d at 885 (finding no adverse employment action where increased travel time to work was the only negative consequence of an employee's transfer); *Nelson*, 2 F. App'x at 433 (holding that a 60-mile increase in commuting distance did not constitute an adverse employment action where the employee retained the same job title, salary, and benefits). When, in other words, would a reasonable person "need[] to consider relocation"? Maj. Op. at 5. The majority has not articulated answers to these questions.

In the face of the consistent and compelling authorities cited above, the majority relies on a single sentence in *Policastro* stating that courts can consider increased commuting distance as "a factor in determining whether a *constructive discharge* has occurred." Maj. Op. at 5 (citing *Policastro*, 297 F.3d at 539) (emphasis added). But the jury ruled *against* Keeton on his constructive discharge claim, so the only issue before us is whether Keeton suffered an adverse employment action. I therefore

find the statement from *Policastro* on which the majority relies unpersuasive for two reasons. First, the majority has cited no authority for the proposition that something that is only one factor in the constructive-discharge inquiry can, in and of itself, constitute an adverse employment action. Second, even if that proposition had legal support, the jury whose verdict the majority affirms in the present case found that the transfer did *not* rise to the level of a constructive discharge. As a consequence, neither the holding in *Policastro* nor the principle that the majority extracts from that case supports the majority's conversion of one factor in the constructive-discharge analysis into the sole basis for finding an adverse employment action.

This is not to say that lateral geographic transfers can *never* amount to a constructive discharge and therefore satisfy the adverse-employment-action requirement. Assume, for example, a hypothetical case where the employer repeatedly ships its employee to different locations, ordering another transfer each time the employee settles in at the new location. A jury under such circumstances might reasonably conclude that the continuous transfers created an "objectively intolerable" working situation. But this hypothetical neither bolsters

the majority's analysis nor helps Keeton, because his constructive-discharge theory was specifically rejected by the jury.

The majority next resorts to the general statement, made in yet another case finding no adverse employment action, that this transfer falls into the category of "other indices that might be unique to a particular situation." Maj. *Op.* at 5 (citing *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999)). But these "other indices," which this court also mentioned in *White*, 364 F.3d at 799, refer not to the plaintiffs personal or family situation, but instead to the "terms and conditions of employment." *Kocsis*, 97 F.3d at 886 (quoting *Spring*, 865 F.2d at 886). That much is clear from the context of this court's first use of the "other indices" language in *Kocsis*. *See* 97 F.3d at 886 (quoting *Crady*, 993 F.2d at 136).

In *Kocsis*, the quoted language appeared at the end of a list of employment actions short of termination that would nevertheless qualify as adverse. Because that list, like most, was not meant to be exhaustive, the court added the category of "other indices...unique to a particular situation," a type of catch-all meant to include employment decisions that, although not universally recognized as

negative, would likely be viewed as adverse by an employee in a particular setting. *See, e.g.*, *Molnar v. Booth*, 229 F.3d 593, 600 (7th Cir. 2000) (applying *Crady* and concluding that a school principal's act of taking away the supplies of an art teacher constituted an adverse employment action because the supplies were "necessary for her to be able to perform her assigned job").

What, then, are the "other indices" unique to Keeton's situation that convert an otherwise legitimate lateral transfer into an adverse employment action? The majority's discussion seems to turn on three factors: (1) that Keeton's transfer was a direct result of unlawful discriminatory conduct on the part of his supervisor; (2) that Keeton's wife suffered from a back problem that prevented her from accompanying him to Cannonsburg; and (3) that Keeton chose to maintain two residences, one in each town.

The first factor, however, is common to all cases brought under federal anti-discrimination laws. That is, all plaintiffs in sexual harassment suits brought under Title VII necessarily must allege that their employers subjected them to discrimination "because of" their sex. *See* 42 U.S.C. § 2000e-2a(1) (2000) (prohibiting discrimination "because of

[an] individual's race, color, religion, sex, or national origin); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80 (1998) (observing the Title VII "is directed... at 'discriminat[ion]...because of...sex'") (citation omitted) (emphasis removed). The only distinction between the run-of-the-mill employment discrimination case and the present case is that Flying J, unlike most defendants, does not contest the charge that Keeton was harassed by his former supervisor.

But that distinction is really no difference at all, because a finding of no adverse employment action typically requires the court to assume the truth of the plaintiff s other allegations. *See, e.g., Kocsis*, 97 F.3d at 885 (assuming, in an ADA case, that the plaintiff was disabled when it held that she had not suffered an adverse employment action); *Sanchez*, 164 F.3d at 532 (resolving the adverse employment-action inquiry without questioning the other aspects of the plaintiff's ADEA claim). The present case, in other words, is conceptually analogous to all anti-discrimination suits in so far as the employment decision that the plaintiff claims is adverse is allegedly a product of the defendant's discriminatory motives or behavior. Flying J's admission that Keeton was transferred

as a solution to his supervisor's discriminatory conduct therefore does not obviate the need to conduct a wholly separate analysis as to the adversity of the transfer.

The other two factors certainly establish that the transfer was inconvenient to Keeton's personal life, but our cases make clear that "mere inconvenience" is not enough. Instead, the employer's decision must have a materially adverse effect on the terms and conditions of the person's employment. *Kocsis*, 97 F.3d at 886; *see also Haimovitz v. United States Dept. of Justice*, 720 F. Supp. 516, 526 (W.D. Penn. 1989) ("Although plaintiff may have concluded that such a relocation would adversely affect his personal life, the [anti-discrimination laws] only address[] those business decisions [that] adversely affect one's employment opportunities."). Indeed, if these second two factors are the true basis for finding Keeton's situation sufficiently "unique," one wonders whether the result would be different if Keeton were unmarried, or widowed, or if the household occupant suffering from serious physical problems were a parent, a child, or the family pet, instead of a spouse.

I believe that the majority's failure to provide any guidance beyond the facts of the present case is

unsatisfactory because today's decision, if followed, will require employers to examine the personal characteristics and living situations of each affected employee before taking any action that might even marginally change that person's life. In essence, the majority reads the standard catch-all language of "other indices" as encompassing the collateral effects that employment decisions might have on the personal or family life of the affected employee. This reading, I fear, will force courts to depart from the settled ground of objective inquiry and instead require them to probe whether, under the plaintiffs specific life circumstances, the employment decision could be viewed as materially adverse. Once again, caselaw and policy considerations counsel against importing this type of subjective test into a crucial step of our Title VII analysis.

B. A plaintiff's subjective preferences and characteristics should not be considered in the adverse-employment-action inquiry

This court has consistently applied an objective standard in evaluating both the adverse employment-action prong of the anti-discrimination laws and claims of constructive discharge. *See, e.g., Strouss v. Mich. Dep't of Corr.*, 250 F.3d 336, 342 (6th Cir. 2001) (explaining that a

lateral transfer could be an adverse employment action "if the conditions of the transfer would have been objectively intolerable to a reasonable person") (internal citation omitted); *Policastro*, 297 F.3d at 540 (employing an objective, "reasonable person" standard). Although the majority purports to apply an objective standard in the present case, its analysis belies that contention.

The majority recognizes that Keeton agreed to relocate in his initial job application, that he agreed to the transfer to Cannonsburg when Abdalla offered it to him, and that "Keeton did not present any evidence that Cannonsburg was objectively a worse location than Walton." Maj. Op. at 4. Notwithstanding these facts, the majority concludes that a reasonable person who has twice agreed to relocate suffers a materially adverse change in the terms and conditions of his employment when a geographic, lateral transfer takes place. This is so, the majority says, because Keeton originally agreed to relocate "for advancement within the company and not as a result of unlawful sexual harassment." Maj. Op. at 5. What renders the lateral transfer here adverse in the eyes of the majority, then, are not the objective effects of the transfer, but rather Keeton's subjective expectations as to the reasons for being

transferred and the particular circumstances of his family life. This subjective analysis stands in stark contrast to the objective standard normally used, which examines the employment decision from the point of view of a reasonable person, not that of a person who expected to be transferred for only one reason and whose spouse is unable to move.

The majority's failure to acknowledge the subjective nature of its analysis is not surprising, given that our sister circuits have uniformly endorsed an objective standard for analyzing potentially adverse employment actions. *See Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1448 (11th Cir. 1998) (finding "no case, in this or any other circuit, in which a court explicitly relied on the subjective preferences of a plaintiff to hold that [the] plaintiff had suffered an adverse employment action"). Such a standard is consistent both with the one used to evaluate "employers' claims and defenses" in suits brought pursuant to federal anti-discrimination laws, *id.* at 1450, and with the purpose behind the adverse-employment-action requirement-namely, "to prevent the kind of claims based upon trivial employment actions that a strictly literal reading of" the laws would allow. *White*, 364 F.3d at 799.

In contrast, evaluating the subjective impressions or motivations of either the employer or the affected employee threatens the integrity and coherence of the *McDonnell Douglas* framework. The Eleventh Circuit cogently explained in *Doe* that adopting a test for adversity based on a plaintiff's subjective preferences

> would create an odd situation in which a plaintiff could use the *McDonnell Douglas* test not only to avoid having to prove directly his employer's discriminatory intent, but also to force his employer to either disprove the plaintiff's own subjective feelings or concede an element of the plaintiff's *prima facie* case.

Doe, 145 F.3d at 1451. On the other hand, allowing a plaintiff to base the adversity of the employment decision on the strength or persistence of an employer's discriminatory animus, as the magistrate judge did in the present case, confuses proof of discrimination, whether direct or circumstantial, with evidence that the victim of that discrimination has suffered a materially adverse change in the terms or conditions of his employment. This diminished quantum of proof reduces the efficacy of the adverse-employment-action element as a filter for shielding businesses from liability for employment decisions that do

no more than inconvenience an employee. *See White*, 364 F.3d at 799.

Applying an objective standard, numerous decisions have made explicit what was implicit as far back as *Spring*—that, in Judge Posner's words, "a *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (emphasis in original); *accord Doe*, 145 F.3d at 1449 (agreeing that "a truly lateral transfer cannot be adverse"); *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999) ("[A] plaintiff who is made to undertake or who is denied a lateral transfer...does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment...."). Unfortunately, the majority deviates from this bright-line, objective rule and concludes that Keeton's transfer to Cannonsburg, which the parties agree did not alter "the terms, conditions, or privileges" of his employment, *Brown*, 199 F.3d at 457, is somehow distinguishable from the lateral transfers that courts uniformly deem not to be adverse.

In the end, the majority simply fails to demonstrate how Keeton's transfer to Cannonsburg, a move in which he acquiesced, was "objectively equivalent" to a demotion. *See Doe*, 145 F.3d at 1450 (observing that the circuits "have only held transfers to be adverse where the transfers were objectively equivalent, at least to some degree, to demotions"). However inconvenient it may have been, Keeton's transfer to Cannonsburg was far from a demotion. He retained the same job title, pay, and benefits, including his salary for the week that it took him to take up his new post. Yet instead of rewarding Flying J for its prompt actions in remedying the transgressions of a rogue supervisor, the majority punishes the company and thereby chills the type of corrective action that Title VII should encourage, not deter.

C. The majority's opinion undermines the policies underlying Title VII

The policies underlying recent decisions in this area by the Supreme Court also weigh strongly in favor of reversal. In defining the various theories of liability under Title VII and the defenses thereto, the Supreme Court has sought to encourage employers to implement internal mechanisms for weeding out discriminatory conduct. *See*

Burlington Indus., 524 U.S. at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (establishing an affirmative defense, in hostile-work-environment cases, for employers who put in place procedures to prevent and promptly correct sexually harassing behavior). But the Court in *Burlington Industries* and *Faragher* specifically refused to tie the hands of companies by requiring, as a matter of law, that they promulgate antiharassment policies in order to invoke the affirmative defense. *See Faragher*, *524* U.S. at 807. Title VII, at least in the Court's view, affords companies the flexibility necessary to devise internal remedies to discriminatory conduct and personnel problems.

Here, however, the majority is essentially telling Flying J that only one course of action in response to Keeton's allegations would have permitted it to avoid liability-the firing or transferring of Judy Harrell, Keeton's supervisor. Instead, Flying J acted promptly on Keeton's complaint, knowing that it could not keep Keeton and Harrell at the same location. But, as the majority holds today, Flying J was unable to avoid liability by transferring Keeton, despite his expressed willingness to move to the district managed by Abdalla. The only solution, therefore,

would have been to fire or transfer Harrell, the store manager, a move that would have required identifying another location with a managerial vacancy or displacing another worker. Nothing in Title VII commands that a company's options for handling discriminatory conduct be so limited.

Outside of the broader policy implications of the majority's reasoning, I believe that today's decision sends the wrong message to employers. Flying J acted expeditiously in responding to allegations of sexual harassment against one of its employees, quickly corrected a supervisor's unlawful abuse of power, and immediately reinstated the employee who was wronged. This company, and others like it, must continually monitor and correct discriminatory conduct on the part of their supervisory employees. Unfortunately, today's decision both reduces companies' incentives to combat discriminatory behavior and limits the solutions that those companies can lawfully implement in the face of such behavior. When combined with a lack of support in the decisions of this or any other court, these pernicious policy consequences counsel against reaching the result that the majority does today.

III. CONCLUSION

Keeton is undoubtedly a sympathetic plaintiff, and the majority's desire to reach beyond Keeton's own arguments and find a basis for affording him relief is therefore understandable. Judicial restraint, however, cautions against adopting a position whose merits have not been advocated even by the party seeking relief. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 523 n.10 (1991) (explaining the principle that an appellate argument, even if presented to the reviewing court by an amicus, will not be considered "when that argument...was not advanced...by the party on whose behalf the argument is being raised"). This cardinal principle is especially true where, as here, endorsing that untested position constitutes a marked deviation from consistent precedent and from the policies underlying the federal laws at issue.

Instead of breaking new ground, as the majority does, I would simply adhere to the existing caselaw and reaffirm the conclusion that those cases universally reach- that geographic inconvenience alone does not convert a purely lateral transfer into an adverse employment action. This is true even when, as here, the transfer is the employer's solution to quid pro quo harassment caused by

the employee's supervisor. I would therefore reverse the judgment of the district court and remand the case with instructions to grant Flying J's motion for judgment as a matter of law. From the majority's contrary conclusion, I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON
CIVIL ACTION NO. 02-269-JGW

KYLE KEETON, PLAINTIFF

V.

FLYING J INC., DEFENDANT

FILED
July 27, 2004
Eastern District
of Kentucky,
Clerk

MEMORANDUM OPINION AND ORDER

I. Procedural Background

Plaintiff Kyle Keeton brought suit against his former employer, Flying J Inc., for sexual harassment, retaliation and constructive discharge under Title VII and KRS Ch. 344 following incidents with Keeton's supervisor, Judy Harrell.[1] Defendant's motion for summary judgment was denied on April 16, 2004, because the presiding district judge determined that there were "genuine issues of material fact on the issues of sexual harassment (both

[1] Prior to trial, plaintiff voluntarily dismissed separate claims filed against Judy Harrell, as well as a claim for intentional infliction of emotional distress under state law.

hostile environment and *quid pro quo*), retaliation, and constructive discharge." [DE #40]. The parties subsequently consented to final disposition before the undersigned magistrate judge, pursuant to 28 U.S.C. § 636(c).

Prior to trial, the parties filed Agreed Proposed Jury Instructions. Following a three-day trial begun on April 26, 2004, a jury found in favor of plaintiff on his claim of sexual harassment and in favor of the defendant on the retaliation and constructive discharge claims. The jury awarded plaintiff $15,000 in compensatory damages, with judgment entered on April 28, 2004. [DE #54]. Defendant filed a timely Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(b), to which plaintiff filed a response and defendant, a reply.

Also pending before the court is plaintiff's motion for attorney's fees under 42 U.S.C. § 1988. The defendant has fully responded to plaintiff's motion for fees, but has moved to stay consideration of that motion pending disposition of the Rule 50 motion. Because the Rule 50 motion is properly denied and the attorney's fee petition is not complex, the court will deny defendant's motion to stay and award fees.

II. Factual Background

Although evidence was presented to the jury over three days, only evidence relevant to the parties' motions is summarized herein.

Flying J Inc. operates travel plazas that cater to the interstate traveler. Flying J hired plaintiff in 2001 and assigned him to work as an associate manager of the restaurant located in its Walton, Kentucky facility. Judy Harrell was employed as manager of the same facility and was Mr. Keeton's immediate supervisor. Evidence was presented that Ms. Harrell repeatedly made sexual overtures towards plaintiff that he rejected. On December 4, 2001, Ms. Harrell processed paperwork to terminate Mr. Keeton's employment. Evidence was presented to support a finding that Ms. Harrell first terminated Mr. Keeton, and later fabricated documentation to cover up both the termination and the true reasons for it. Flying J's records contained a fabricated counseling form prepared by Harrell, which purports to reduce the termination to a suspension for unspecified misconduct. Keeton was never absolved of the alleged misconduct.

The day of his termination, Mr. Keeton spoke to Jamal Abdulla, manager of a similar facility in

Cannonsburg, Kentucky. In short order, the termination was rescinded and changed to a suspension, which was also rescinded. Keeton ultimately accepted a transfer from Walton to Cannonsburg, approximately 120 miles from his home. Keeton's new position was virtually identical to his position in Walton, Kentucky, entitling him to the same pay and benefits. Keeton reported for work in Cannonsburg, but eventually left that position to take a job closer to home.

The parties dispute whether Keeton suffered any delay in receiving his pay. Plaintiff contends - without citation to the record - that some of Keeton's pay was delayed for approximately one month. [Doc #62]. Defendant argues that plaintiff failed to introduce any evidence to show a delay in compensation. This court has no independent recollection of the evidence on this issue, but concludes that the defendant's motion should be denied even if plaintiff failed to present evidence on this discrete point.

III. Analysis

Defendant's Motion for Judgment Under Rule 50

Defendant argues that it is entitled to judgment as a matter of law because plaintiff failed to prove that he

suffered a tangible employment action. Defendant argues that plaintiff failed to prove a loss in payor benefits, ultimately was not suspended or fired, and that the transfer from Walton to Cannonsburg was not adverse. Alternately, Defendant argues that the jury verdict was inconsistent.

A. Jury Instructions

To fully understand defendant's arguments, it is necessary to first review the parties' jointly stipulated jury instructions:

> Instruction No. 11
> Harassment Based On Sex
>
> Harassment based on sex does not include all verbal or physical harassment in the workplace. Rather, Plaintiff must show that the harassment was based on his sex. This means that Plaintiff must show that he was exposed to disadvantageous terms or conditions of employment to which members of the opposite sex were not exposed.
>
> Instruction No. 12
> Not All Sexual Remarks or Conduct Are Unlawful
>
> The law is not violated simply because a supervisor's conduct is offensive, annoying or flirtatious. Likewise, simple

teasing or roughhousing or mere utterances of epithets which engender offensive feelings in an employee do not affect the conditions of employment to a significantly sufficient degree to violate the law. Casual sexual innuendos or casual jokes do not constitute actual sexual harassment, nor does impolite or annoying behavior.

Instruction No. 13
The Test for Severity and Pervasiveness

To determine whether Plaintiff's working conditions were so severe or pervasive as to constitute unlawful sexual harassment, Plaintiff must prove two things: (1) that he actually found the work environment to be hostile or abusive and (2) that a reasonable person would have found the environment to be hostile and abusive. If Plaintiff shows that he was subjected to sexual comments and behavior that he did not actually find to be hostile and abusive, even if a reasonable person would have found it to be such, you must return a verdict for Defendant. To determine whether he actually found that the terms and conditions of his employment were hostile and or abusive, you should look at whether the alleged discriminatory conduct unreasonably interfered with Plaintiff's work performance. Thus, if you find the alleged sexual harassment did not affect his job performance or working conditions, then, as a matter of law, he cannot prove sexual

harassment. On the other hand, even if you find that the Plaintiff actually found the environment to be hostile or abusive, he is not entitled to your verdict if you find that he was unreasonable in reacting that way. The law was not intended to be a general civility code addressing simple teasing, offhand comments, ordinary socializing, and intersexual flirtation.

In applying this standard, all circumstances, expectations and relationships of those involved should be considered, including the frequency of the discriminatory conduct if any; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interfered with Plaintiff's work performance.

Instruction No. 14
Sexual Harassment Resulting in a Tangible Employment Action

The law also prohibits employers from sexually harassing employees by taking tangible employment actions against employees who do not succumb to sexual advances. However, to prove this claim, Plaintiff must prove both: (1) that he was subjected to sexual harassment as I have defined that for you; and (2) that Defendant took a tangible employment action against him due to the harassment. A "tangible employment action" is not just any

employment action. Rather, Plaintiff must prove he was discharged, demoted, or given an undesirable assignment as a result of his refusal to submit to a supervisor's sexual demands.

Instruction No. 16
Retaliation

In order for Plaintiff to recover on his claim of retaliation against Defendant, Flying J. Inc., he must prove that:

1) He engaged in opposition to sexual harassment by making a complaint of sexual discrimination while he was still employed, whether or not sexual harassment actually occurred;

2) There was an adverse action by Defendant at the same time or after Plaintiff's opposition to discrimination; and,

3) Plaintiff suffered the adverse action because he complained of sexual harassment.

To prove that an adverse action occurred, Plaintiff must show he suffered a materially adverse change in the terms and conditions of his employment. It is not enough for Plaintiff to show a mere inconvenience or change in his responsibility without salary or shift changes. Rather, Plaintiff must show a loss in pay, benefits,

title, job responsibilities or other factors unique to his particular situation.

If the employer took such adverse action against the employee for some legitimate, non-discriminatory reason, there would be no violation of the law.

Therefore, to prove his claim of retaliation, Plaintiff must prove: (1) Defendant's reason for the adverse action is not its true reason; and (2) that the true reason for the action was because Plaintiff complained of sexual harassment.

The Verdict Form supplied to the jury contained special interrogatories. The jury responded "Yes" to the following interrogatory:

Sexual Harassment

1. Did Mr. Keeton prove that he rejected sexual advances by Judy Harrell and that, as a result, he suffered a tangible employment action as I have defined that term to you?

...

If you answered "No" to Question No.1, go to Question No.2. If you answered "Yes" to Question No.1, go to Question No.4.

Questions 2 and 3, to which the jury was not required to respond according to written instructions, were

interrogatories concerning plaintiff's sexual harassment hostile work environment claim. The hostile work environment claim did not require a showing of a tangible employment action.[2] Considering that the Interrogatories were agreed upon by the parties, it is apparent that both parties believed that the jury need not reach the issue of hostile work environment if it found that plaintiff had proven his sexual harassment claim based upon a tangible employment action.

In hindsight, it would have been preferable to require the jury to respond to the interrogatory concerning sexual harassment in the absence of a tangible employment action. In a case decided after trial of this matter, the United States Supreme Court articulated even more clearly the elements of such a claim and the basis for an employer defense. *See Pennsylvania State Police v. Suders*, 124 S.Ct.

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[2] As the Sixth Circuit recently summarized: "As the one alternative to showing the existence of an adverse employment action, a plaintiff may support a Title VII claim by showing that 'plaintiff was subjected to severe or pervasive retaliatory [or other discrimination based] harassment by a supervisor.'" *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789, 796 n.1 (6th Cir. 2004) (quoting *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000)).

2342 (2004). It is likely, given the evidence presented by the plaintiff, that the jury could have rendered a plaintiff's verdict in this case under the standards articulated in *Suders.* However, the lack of an interrogatory concerning this issue does not require granting defendant's motion because the jury's verdict can also be upheld on the sexual harassment claim founded on adverse employment action.

An additional interrogatory was directed specifically to plaintiff's retaliation claim:

> **Retaliation**
>
> 4. Did Mr. Keeton prove by a preponderance of the evidence that he complained of sexual harassment while he was employed and that as a result, he suffered an adverse employment action as I have defined that term to you?

The jury responded "No." The jury further responded "No" to an interrogatory asking whether the plaintiff had proven that in response to his complaint of sexual harassment, he was constructively discharged.

B. Adverse Employment Action

The defendant argues primarily that plaintiff failed to prove he suffered from an adverse employment action.

When resolving a motion pursuant to Rule 50(b), a court must review all evidence in the light most favorable to the nonmoving party to determine whether there was a genuine issue of material fact for the jury. *White v. Burlington Northern and Santa Fe Railway Co.*, 364 F.3d 789, 794 (6th Cir. 2004). Here, the parties agree that the plaintiff was transferred from Walton to Cannonsburg, and dispute only whether there was an actual suspension in employment or a delay in pay.

The plaintiff fails to cite to the record - and this court no longer has an independent recollection - concerning evidence of whether plaintiff suffered any delay in pay resulting from the transfer to Cannonsburg. The defendant asserts that plaintiff failed to present any evidence of a delay in pay. Regardless of what the record may show, defendant's motion will be denied because it was reasonable for the jury to conclude that the transfer alone was a tangible employment action.

Defendant advances several reasons why the transfer was not adverse and therefore not a tangible employment action. First, Keeton had previously agreed to relocate upon request as a condition of his initial employment. Second, the reassignment involved identical

pay, benefits and job position. Third, adversity must be grounded in the employment itself and not in any adverse effects on personal or family life. Finally, Keeton did not request any damages related to the transfer.

Defendant's contentions are irrelevant, even if true, because they do not address the consideration of "indices that might be unique to a particular situation." *White*, *supra* at 803. The fact that Keeton agreed to relocate in his employment application does not negate the jury's conclusion that the defendant's asserted reasons for Keeton's transfer were pretextual and that the true reason for his transfer was the sexual harassment he experienced from Ms. Harrell. *Id.*, 364 F.3d at 804.

With respect to whether reassignment with identical employment terms can be considered to be an adverse or tangible employment action, the Sixth Circuit has directed courts to consider "indices that might be unique to a particular situation." *Id.* at 799. In *White*, the court held that a transfer was a demotion notwithstanding the identical pay and benefits, due to factors unique to the particular situation including the fact that the transfer job was dirtier. *Id.* at 803. The court noted that transferring an employee to "some wretched backwater" would be actionable. *Id.* at

804. In this case, Cannonsburg was 120 miles away from Keeton's home. Although a transfer to Cannonsburg may have been authorized by Keeton's employment contract, the jury was entitled to conclude that the transfer was adverse, in view of the totality of the evidence presented which included ample evidence of sexual harassment by Ms. Harrell, an attempted and then rescinded illegal discharge, and fabricated documentation designed to conceal the true reasons for the discharge/suspension.

Defendant argues that for the jury to have found the transfer adverse, it could only consider the position itself and not any adverse effects on Keeton's personal or family life. *See Cherchi v. Mobil Oil Corp.*, 693 F. Supp. 156 (D.N.J. 1988). However, Keeton's experience of domestic hardship did not preclude the jury from finding adversity. Intolerability of working conditions is assessed by the objective standard of a "reasonable person" in the employee's position. *Id.* at 162. In this case, the plaintiff presented evidence sufficient to support a jury finding that the reassignment was an intolerable condition created by sexual harassment in the Walton location.

Defendant additionally argues that the plaintiff should not be permitted to recover for sexual harassment

because he did not claim actual damages for his transfer to Cannonsburg. However, there is no legal requirement that plaintiff seek compensation for all injuries. Plaintiff's failure to claim a particular element of damages does not entitle the defendant to judgment as a matter of law.

In sum, the jury was presented with sufficient evidence to conclude that the transfer to a distant location was a tangible employment action when combined with the overall evidence of sexual harassment, wrongful termination/suspension (even though later rescinded), and fabricated documentation. The jury was entitled to view the entirety of the circumstances surrounding the transfer to determine whether it constituted an adverse employment action.

C. Verdict Can Be Reconciled

Alternatively, the defendant argues that the jury's verdict is inconsistent because the tangible employment action/sexual harassment claim and the retaliation claim were two theories of recovery for the *same* conduct - the transfer. According to the defendant, "[t]here is no logical way to explain how the jury could find on the one hand that the transfer was a tangible employment action [to support

the sexual harassment claim] while finding on the other that the transfer was not retaliatory [to support the retaliation claim]."

When faced with a claim that a verdict is inconsistent, the court must look for reasonable ways to read answers to interrogatories as expressing a coherent and reasonable view of the case. *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 511 (6th Cir. 1998). In this case, the tangible employment action (sexual harassment) claim and the retaliation claim are consistent alternative theories of recovery. A tangible employment action generally brings direct economic harm. *White*, 364 F.3d at 798. A retaliation claim is based on retaliatory motive. *Id.* The jury instructions adequately distinguished the proof required for each. Although the interrogatories may not have completely reflected every element of each claim the preceding instructions did so.

It was reasonable for the jury to conclude that the transfer harmed Keeton directly based on the motive of pure sexual harassment, without necessarily satisfying all elements of a retaliation claim. Because the Court can reasonably reconcile the jury's interrogatory answers, the fact that the jury returned a verdict on one action but not

another is insufficient to grant a motion for judgment as a matter of law.

IV. Plaintiff's Motion for Attorney's Fees

Plaintiffs seek a total award of $40,647.50 in attorney's fees and $1,897.86 in costs for their efforts. The bulk of plaintiffs' claimed fees and costs are appropriate and will be awarded. However, the court has reduced the claimed hourly rate of pay for counsel, resulting in a lower total award.

A. Basis of Relief

The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C.S. § 1988 permits a court in its discretion to allow the "prevailing party" in a 42 U.S.C.S. § 1983 action "reasonable" attorney's fees as part of the costs. *Cramblit v. Fiske*, 33 F.3d 633, 634 (6th Cir. 1994). In order to qualify under § 1988, a plaintiff must be a prevailing party. *Farrar v. Hobby*, 506 U.S. 103, 109, 113 S.Ct. 566, 572 (1992). Under 42 U.S.C.S. § 1988, even a plaintiff who wins only nominal damages is a prevailing party. *Id.* at 573. The prevailing party inquiry does not turn on the magnitude of the relief obtained.

To qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his/her claim. *Farrar*, 506 U.S. at Ill. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. *Id.* at 764. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Farrar*, 506 U.S. at 111-12. In this case, there is no question that the jury verdict in his favor entitles plaintiff to an award of fees and costs as a prevailing party.

B. Factors to Consider in Awarding Attorney's Fees

A reasonable attorney's fee is determined by multiplying a reasonable hourly rate times the number of hours reasonably expended on the litigation. *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994). This calculation is known as the "lodestar" figure and "[t]here is a 'strong presumption' that this lodestar figure represents a

reasonable fee." *Building Service Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995).

Once the initial lodestar figure is established, courts generally consider twelve factors in calculating reasonable attorney-fee awards:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Geier v. Sundquist, 372 F.3d 784, 792 (6th Cir. 2004) (quoting *Johnson v. Georgia Highway Express, Inc.*, 488 U.S. 714, 818-19 (5th Cir. 1974)); *see also Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989). The Supreme Court has limited application of these factors since they "usually are subsumed within the initial calculation of hours reasonably

expended at a reasonably hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983). In this case, the factors have been considered but are not addressed individually, as plaintiffs do not argue and I do not find this to be the "rare" or "exceptional" case in which an upward adjustment to the lodestar should be made. *See Pennsylvania v. Delaware Valley Citizens' Council for Clear Air*, 483 U.S. 546, 565 (1986).

C. Defining Plaintiff's Success

The defendant argues that plaintiff's overall claim for fees should be reduced based upon plaintiff's "limited success" at trial. The defendant characterizes the plaintiff's victory as success on "only one of his six claims." In addition to the successful sexual harassment claim, the defendant counts among unsuccessful claims plaintiff's claims for hostile work environment sexual harassment (without a tangible employment action), retaliation, and constructive discharge. The defendant also notes that prior to trial, plaintiff voluntarily withdrew claims for intentional infliction of emotional distress and for punitive damages.

The defendant exaggerates the extent of plaintiff's "unsuccessful" claims. The defendant asserts that the jury

failed to award the plaintiff back pay - but under the agreed upon jury instructions, back pay was not a permitted item of damages for the sexual harassment claim on which plaintiff prevailed. Similarly, the jury instructions did not permit submission of plaintiff's hostile work environment sexual harassment claim to the jury once the jury determined the existence of a tangible employment action. If the instructions had permitted submission of the claim to the jury, it is probable, based on the evidence presented, that the plaintiff would have prevailed on it. Plaintiff's punitive damages claim and intentional infliction of emotional distress claims under state law were so closely related that they could be considered as one claim, not two. Looking at the totality of the circumstances, it would be unfair to characterize the plaintiff's success as limited or minimal. The plaintiff managed to convince an all-male jury to set aside numerous stereotypes and believe the plaintiff's story that he, a 6'3" 245 pound man, had been sexually harassed by a petite 5'2" woman.

Moreover, where facts or legal theories are interrelated, a district court should not apportion expenses mechanically. *Paschal*, 297 F.3d at 437. In this case, the facts and legal theories of the unsuccessful claims were

closely related to the claim on which the plaintiff prevailed, and the overall hours claimed appear to have been both necessary and reasonable. Therefore, no reduction of fees should be made on the basis that the plaintiff failed to succeed on every claim.

D. Prevailing Market Rate

Having determined that there is no basis for reducing fees, it remains only for the court to determine the reasonable hourly rate. Plaintiff seeks hourly rates of $250 for Mr. Gary Winters (in practice since 1976), $200 for Mr. Joseph Gruber (in practice since 1986), $165 for Mr. Ian Smith (in practice since 1997), and $85 for Ms. Lisa Ochs (paralegal). The defendant has not challenged the claimed hourly rates.

The Sixth Circuit affords discretion to trial courts to set a reasonable hourly fee, but has cautioned courts to "provide an adequate explanation of the reasons for its award and the manner in which that award [is] determined." *Geier v. Sundquist*, 372 F.3d at 791. In *Geier*, the appellate court recently reversed a trial court based upon that court's failure to discuss the evidence supporting the higher hourly rate sought by the plaintiffs.

This court finds plaintiff's figures to be only slightly higher than prevailing rates in the Eastern District of Kentucky. Recently, the court reviewed hourly rates sought by counsel in another case of up to $300 per hour, but found "no justification" for awarding higher than $220 per hour in this jurisdiction. In reviewing the affidavit submitted by Mr. Winters in this case, the court finds nothing to support higher hourly rates in this case. As recently explained by this court in *Ashcraft v. The City of Covington*, Covington Civil Action No. 02-124-JGW:

> More concerning...is plaintiffs' overall reliance on Cincinnati market rates rather than rates applicable to Northern Kentucky. Though the distance between Northern Kentucky and Cincinnati is less than a mile, it is this court's experience that the relatively short span of river between the two communities can create a mile-wide gap in legal fees. The gap may have narrowed in recent years but nevertheless remains a reality.
>
> '[I]t is not an abuse of discretion to apply local market rates.' *Hudson v. Reno*, 130 F.3d 1193, 1208 (6th Cir. 1997), *cert. denied*, 119 S.Ct. 64 (1998) (quotation omitted). Therefore a lawyer who customarily receives $300 per hour in a field in which competent and experienced attorneys in the region receive less will be compensated at the

> lower rate. *Id.* In light of the lower rates generally charged by competent counsel in Northern Kentucky, the court declines to award the higher rates sought by Cincinnati counsel in this case. Considering the prevailing local rates, and the counsel's skill, experience and reputation, this court finds a rate between $125/hour and $220/hour to be appropriate. Robert Newman and Michael O'Hara will be compensated at $220.00 per hour, Linda Smith and Suzanne Cassidy at $125.00 per hour and Stephen R. Felson at $175.00 per hour. Although the court will award paralegal fees at $60.00 per hour as requested, the court declines to award any sum for time spent by a filing clerk, as clerical/secretarial and filing clerk or "runner" fees are generally not compensable.

Id., DE #63 at pp. 11-12 (footnotes omitted). In keeping with the court's reasoning in the *Ashcraft* case, the court finds $220 per hour to be a reasonable hourly rate for Mr. Winters, $175 per hour to be reasonable for Mr. Gruber, $125 per hour to be reasonable for Mr. Smith, and $60 per hour to be reasonable for Ms. Ochs.

V. Conclusion

As was stated in a Senate Report in 1976, "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private

citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 94-1011, p. 2 (1976). In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. *Id.* If private citizens are to be able to assert their civil rights, and if those who violate the Nations' fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. *Id.* at 3.

As fully explained herein, plaintiff is entitled to an award of fees and costs as follows:

- **R. Gary Winters:**	127 hours x $220	= $27,940.00
- **Joseph C. Gruber:**	11.8 hours x $175	= $2,065.00
- **Ian R. Smith:**	6.6 hours x $125	= $825.00
- **Lisa Oohs:**	64.1 hours x $60	= $3,846.00
TOTAL ATTORNEY'S FEES		**= $34,676.00**
TOTAL COSTS		**= $1,897.86**

Accordingly, **IT IS ORDERED HEREIN THAT** the defendant's motion for judgment as a matter of law [DE #57] be **denied** and that defendant's motion to stay

consideration of plaintiff's motion for fees and costs [DE #66] likewise be **denied. IT IS FURTHER ORDERED THAT** plaintiff's motion for fees and costs [DE #63] be granted and that plaintiffs be awarded a total of **$34,676.00** in attorney's fees and **$1,897.86** in costs, for a total award of **$36,573.86**. Interest shall accrue on the award of fees at the rate of ___, from the date of entry of this Memorandum Opinion and Order. *See Pennington v. Western Atlas*, 2003 WL 40483, *2 (6th Cir. 2003) *distinguishing Associated Gen. Contractors v. Drabik*, 250 F.3d 482, 495 (6th Cir. 2001).

This the 27th day of July 2004.

/s/ J. Gregory Wehrman
J. Gregory Wehrman
United States Magistrate Judge

➳AO450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

FILED
Apr. 28, 2004
Eastern District
of Kentucky,
Clerk

KYLE KEETON **JUDGMENT IN A CIVIL CASE**

v.

FLYING J INC. **Case Number: 02-269**

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED.

That the plaintiff KYLE KEETON recover of the defendant FLYING J INC. the sum of $15,000.00, with interest thereon at the rate of 1.50 percent as provided by law, and their costs of action.

April 28, 2004
Date

LESLIE G. WHITMER
Clerk

/s/ Kimberly R. Stoneking
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CIVIL MINUTES - TRIAL

COVINGTON CIVIL 02-269
AT COVIINGTON **04/28/04**

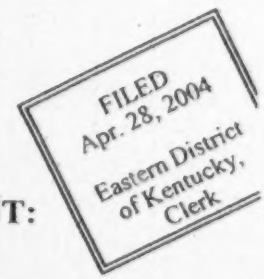
STYLE: KYLE KEETON v. FLYING J INC.

PRESENT:
HON. J. GREGORY WEHRMAN,
MAGISTRATE JUDGE

Stoneking Courtroom Deputy **Blosser** Court Reporter

ATTY. PRESENT FOR PLAINTIFF:

Gary Winters



ATTYS. PRESENT FOR DEFENDANT:

Rob Worley/Shelley Sullivan

X **JURY TRIAL.** The jury impaneled and sworn in as follows:

(1)	William White	(5)	William Goodman
(2)	James Sabelhaus	(6)	David Simpson
(3)	Vincent Cook	(7)	David Middlesworth
(4)	Nicholas Zumdick	(8)	James Whalen

X Evidence for plaintiff continued and concluded.

X Renewed motion for judgment as a matter of law by defendant **DENIED.**

X Jury retires to deliberate @ 11:00 a.m.

X Jury returns with verdict and answers to interrogations @ 4:25 p.m.

X Jury Polled.

Initials of Deputy Clerk: krs

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CIVIL MINUTES - TRIAL

COVINGTON CIVIL 02-269
AT COVIINGTON **04/27/04**

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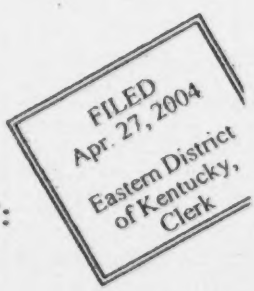
MAGISTRATE JUDGE

Stoneking Courtroom Deputy **Blosser** Court Reporter

ATTY. PRESENT FOR PLAINTIFF:

Gary Winters



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(3)	Vincent Cook	(7)	David Middlesworth
(4)	Nicholas Zumdick	(8)	James Whalen

X Evidence for plaintiff begun and not concluded. Witness who was not able to be present in Court on April 26th and 27th due to transportation problems being called on 04/28/04.

X Evidence for defendant begun and concluded.

X Matter continued for trial at **9:00 a.m. on 04/28/04.**

X Motion for judgment as a matter of law by defendant **DENIED.**

X Renewed motion for judgment as a matter of law by defendant **DENIED.**

Initials of Deputy Clerk: krs

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(2)

Supreme Court, U.S.
FILED
AUG 4 - 2006
OFFICE OF THE CLERK

No. 05-1550

IN THE
Supreme Court of the United States

FLYING J INC.,

Petitioner,

v.

KYLE KEETON,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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August 2006

QUESTION PRESENTED

Should this Court grant, vacate, and remand the decision below for further consideration in light of the Court's recent decision in *Burlington Northern v. White*, where the rationale for Petitioner's pre-*White* GVR request was expressly rejected by the Court in *White*?

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STATEMENT OF THE CASE

Flying J operates a chain of travel plazas catering to interstate travelers. *Keeton v. Flying J*, 429 F.3d 259, 261 (6th Cir. 2005). Respondent Kyle Keeton worked for Flying J as an associate restaurant manager assigned to the Walton, Kentucky plaza. *Id.* At the start of his employment, Flying J orally committed to keep Keeton at the Walton location for five years. *Id.*

Keeton worked at the Walton travel plaza between June and December 2001. During that time, he was never disciplined formally or informally and was never warned that his job was in jeopardy. *Id.* Keeton's immediate supervisor in Walton was Judy Harrell, the general manager of the Walton restaurant. *Id.* In December 2001, Harrell began making sexual advances toward Keeton. *Id.* When Keeton rejected the advances, Harrell fired him, explaining, "you're not supporting me." *Id.*

Keeton complained to district manager Jamal Abdalla, who told him he could maintain his position as associate manager if he transferred to the Flying J location in Cannonsburg, Kentucky, a town 120 miles away. *Id.* Keeton moved to Cannonsburg, but, because his wife suffered from a debilitating back problem, she could not move with him. *Id.* As a result, Keeton was forced to maintain separate residences for himself and his wife. *Id.* at 261-62.

In January 2001, Keeton resigned. *Id.* at 262. He then sued Flying J under Title VII of the Civil Rights Act of 1964, claiming sexual harassment, retaliation, and constructive discharge. *Id.* In his sexual harassment claim, Keeton alleged both that he suffered from sexual harassment resulting in a tangible employment action and, in the alternative, that he suffered from sexual harassment resulting in a hostile work environment. *Id.*

The district court denied Flying J's motion for summary judgment. *Id.* The court also denied Flying J's motion for judgment as a matter of law after Keeton presented his case to a jury and again after Flying J presented its defense. *Id.* The jury returned a verdict for Keeton and awarded $15,000 in compensatory damages for emotional suffering. *Id.* Importantly, the jury found Flying J liable for sexual harassment resulting in a tangible employment action, but not for retaliation or constructive discharge. *Id.* Because of the jury's verdict, the jury form did not require it to decide whether Keeton had also suffered sexual harassment resulting in a hostile work environment. *Id.* Thus, Keeton's claim for sexual harassment resulting in a tangible employment action is the only claim still at issue in this case.

After the verdict, Flying J renewed its motion for judgment as a matter of law, and the court again denied the motion. *Id.* Flying J appealed to the Sixth Circuit, arguing that a lateral transfer to a distant office could not give rise to liability for discrimination under Title VII. *Id.* at 263. The Sixth Circuit disagreed and upheld the jury's verdict. *Id.* at 263-66. In doing so, the court applied the standard set forth by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). *Keeton*, 429 F.3d at 262-63. In *Ellerth*, the Court held that an employer would be strictly liable for sexual harassment if an employee could show that the harassment resulted in a "tangible employment action." *Ellerth*, 524 U.S. at 753-54. Examining its own case law interpreting *Ellerth*, the Sixth Circuit determined that it had never rejected the proposition that a lateral transfer to a distant location could satisfy this test. *Keeton*, 429 F.3d at 264-65. The court held that when sexual harassment results in a lateral transfer to a town 120 miles distant, a jury could reasonably find an employer liable under Title VII. *Id.* at 265.

The Sixth Circuit denied rehearing *en banc*, and Flying J filed a petition for a writ of certiorari in this Court. Flying J asks for a GVR to give the Sixth Circuit an opportunity to consider the Court's recent decision in *Burlington Northern v. White*, 126 S. Ct. 2405 (2006). At the time the petition was filed, a decision in *White* was still pending, so Flying J could only assume that the decision would ultimately affect the outcome in this case. Since then, however, the Court has issued an opinion in *White* that distinguishes Title VII's anti-retaliation provision from its substantive provision, holding that the two provisions have distinct language and purposes and are therefore "not coterminous." *Id.* at 2414.

In its petition, Flying J makes three arguments: 1) an issue similar to the issue before the Court in *White* is at issue in this case, 2) there is a conflict among the courts of appeals regarding the legal standard for a tangible employment action, and 3) the Sixth Circuit's decision in this case is contrary to *Ellerth* and its own precedent. With the benefit of the opinion in *White*, it is clear that Petitioner's arguments are wrong.

REASONS FOR DENYING THE WRIT

A. This Court's Decision in *Burlington Northern v. White* Did Not Alter the Applicable Standard for Title VII Harassment Claims.

Petitioner's first argument in favor of a GVR is that the Sixth Circuit might benefit from this Court's decision in *White*. A GVR is appropriate to give a lower court the benefit of an intervening decision of this Court when the intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Because this Court in *White* dealt only with Title VII's anti-retaliation provision, as opposed to the substantive provision at issue in this case, *White* has no bearing on the correctness of the decision below. In light of the Court's opinion in *White*, a GVR here would serve no purpose.

Under Title VII of the Civil Rights Act of 1964, an employer may not "discriminate against" any individual based on that individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). In *Ellerth*, the Court surveyed decisions from the courts of appeals and found that those courts that had considered the question had found employers liable when a discriminatory act results in a "tangible employment action." 524 U.S. at 760-61. Relying on these cases, the Court defined a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. The Court did not define the outer

boundaries of the substantive discrimination provision, but rather established the consequences for an employer when the provision has been violated in a sexual harassment case. Specifically, the Court held that "[w]hen a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Id.* at 753-54.

Aside from the Act's substantive discrimination provision, a separate anti-retaliation provision provides that an employer may not "discriminate against" an employee or job applicant because that individual "opposed any practice" that Title VII forbids or "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a). Prior to *White,* the courts of appeals were split on the meaning of the term "discriminate against" in this provision. *White*, 126 S. Ct. at 2410-11. The Sixth Circuit was one of several circuits that held "discriminate against" had the same meaning in both the substantive anti-discrimination provision, § 2000e-2(a), and the anti-retaliation provision, § 2000e-3(a). *Id.* at 2410. Other circuits had adopted a more restrictive standard for retaliation claims, requiring an "ultimate employment decision" that limited actionable conduct to acts "such as hiring, granting leave, discharging, promoting, and compensating." *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (quotation omitted); *see also Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997). Still other circuits provided a looser standard, requiring a plaintiff to show only that the employer's challenged action would have been material to a reasonable employee. *Rochon v. Gonzales*, 438 F.3d 1211, 1217-19 (D.C. Cir. 2006); *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

As noted above, the only claim still at issue in this case is Keeton's claim for sexual harassment resulting in a tangible employment action under Title VII's substantive provision, § 2000e-2(a). In contrast, the only claim at issue in *White* was an anti-retaliation claim under § 2000e-3(a). The question before the Court in *White* was, therefore, the proper standard to apply to a retaliation claim and, in particular, whether that standard was the same or different from the standard for discrimination claims set forth in *Ellerth*. Petitioner necessarily based its argument for a GVR on the assumption that the Court would conclude that the standards under the discrimination and retaliation provisions are the same; otherwise, this Court's clarification of the standard under the retaliation provision would have no bearing on the correctness of the Sixth Circuit's decision in this case.

Now that this Court has issued its decision in *White*, it is clear that Petitioner's assumption was wrong. In *White*, the Court resolved the circuit split over the Act's anti-retaliation provision by holding that "Title VII's substantive provision and its anti-retaliation provision are not coterminous." 126 S. Ct. at 2414. As the Court noted, the two provisions "differ not only in language but in purpose as well." *Id.* at 2412. Although "[t]he substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status," "[t]he anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* Adopting the standard used by the Seventh and D.C. Circuits, the Court concluded that the retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." *Id.* at 2409.

Given the fundamental distinction between a substantive discrimination claim and a retaliation claim, the Court in *White* would not have had any reason to overrule or modify *Ellerth*'s holding on the proper standard for strict liability in substantive discrimination cases, and it did not do so. Indeed, *White* noted that "*Ellerth* did not mention Title VII's anti-retaliation provision at all." *Id.* at 2413. For this reason, nothing in *White* casts any doubt on the correctness of the standard applied by the Sixth Circuit in this case.[1]

Furthermore, *White* casts no doubt on the Sixth Circuit's application of the law to the facts. The Court in *White* held only that a lateral transfer was sufficient to trigger the Act's anti-retaliation provision, but gave no indication that such a transfer would fail to satisfy the more stringent requirements of Title VII's substantive discrimination provision. Every judge on the *en banc* Sixth Circuit that applied the stricter standard in *White* found the standard satisfied there, as did Justice Alito in his concurring opinion in this Court. *Id.* at 2421-22 (Alito, J., concurring). Petitioner claims that lateral transfers are a mere inconvenience and a matter of personal preference that do not trigger Title VII liability, but the *White* majority rejected the contention that the lateral transfer in that case was a trivial harm or a minor annoyance, citing case law interpreting Title VII's substantive discrimination provision. *Id.* at 2415. Thus, the decision in *White* is consistent with the conclusion that a lateral transfer would satisfy the standard for *either* a discrimination or an anti-retaliation claim. Moreover, even assuming that there were some question as to whether Title VII's anti-

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[1]Because *White* resolved the split in the circuits on the proper standard of review, Petitioner's second argument, that there is a split regarding the proper standard, is no longer relevant.

discrimination provision could support a claim based on a lateral transfer, a GVR based on *White* would not assist the Sixth Circuit in resolving that question because, as explained above, *White* concerned the anti-retaliation provision. For this reason as well, the petition should be denied.

B. The Court Below Properly Applied Controlling Precedent.

Petitioner also urges this Court to issue a GVR because it contends that the decision below is contrary to both *Ellerth* and Sixth Circuit precedent. *Ellerth*, however, was decided in 1998 and is not an intervening decision that would justify a GVR in this case. Furthermore, the Sixth Circuit has already considered and rejected Petitioner's arguments about the correct application of its precedent to the facts here.

In *Ellerth*, this Court held that an employer's "tangible employment action" constitutes a change in the terms and conditions of employment that is actionable under Title VII's substantive discrimination provision. *Ellerth*, 524 U.S. at 753-54. In adopting the tangible employment action standard, the Court relied on decisions from the courts of appeals, including the Sixth Circuit in *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996). *See* 524 U.S. at 761. *Kocsis* held that a plaintiff must show "a materially adverse employment action" to demonstrate actionable conduct under Title VII. 97 F.3d at 885-86.[2] Neither *Ellerth* nor *Kocsis* set forth an exhaustive list of actions that satisfy the relevant standard. *Kocsis* held merely

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[2]The Sixth Circuit uses the terms "tangible employment action" and "adverse employment action" interchangeably. *Keeton*, 429 F.3d at 263 n.1.

that such actions might include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id.* at 886 (quotation omitted).

Carefully examining both *Ellerth* and its own case law, the Sixth Circuit in this case noted that "reassignments without salary or work hour changes do not *ordinarily* constitute adverse employment decisions in employment discrimination claims." *Keeton*, 429 F.3d at 264 (quoting *Kocsis*, 97 F.3d at 885). Nevertheless, the court noted that it had not precluded consideration of such factors as commuting distance or relocation, and concluded that, when sexual harassment results in a lateral transfer to a town 120 miles distant, a jury could reasonably conclude that the employee has suffered a materially adverse employment action. *Id.* at 265. The court found this case to be an instance where "other indices that might be unique to a particular situation" justify the jury's finding of liability. *Id.* (citing *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999)). Because the court already fully considered both *Ellerth* and its own case law, a GVR would serve no useful purpose. There is nothing further for the Court to consider.

Petitioner rehashes the same arguments already considered and rejected by the Sixth Circuit below. It quotes the court's statement in *Kocsis* that a change in employment conditions "must be more disruptive than a mere inconvenience or an alteration of job responsibilities" to give rise to liability under Title VII. *Kocsis*, 97 F.3d at 886. Relying heavily on the Sixth Circuit's prior decision in *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002), Petitioner argues, as it argued in the Sixth Circuit, that a lateral transfer to a different

location can never constitute an adverse employment action. The Sixth Circuit, however, fully considered and rejected this argument, citing *Policastro*'s statement that "increased distance from home to a new position is a factor in determining whether a constructive discharge has occurred." *Keeton*, 429 F.3d at 265. The court also relied on its prior decision in *White*, where the *en banc* Sixth Circuit upheld Title VII liability for a lateral transfer (albeit under a stricter standard than necessary) to a position that was dirtier, more arduous, and less prestigious than the employee's prior position. *White v. Burlington Northern*, 364 F.3d 789, 803-04 (6th Cir. 2004).

Petitioner contends that "Flying J's case involves change even more minor than the slight change in job responsibilities and prestige of *White*." Pet. 16. In doing so, Petitioner minimizes the impact of the transfer—and the impact of the employer's actions as viewed by this Court in *White*— stating that "[t]he only aspect of Mr. Keeton's job that changed was that he would move to, and be working in, a different town." *Id.* 9. However, a transfer to a different town 120 miles distant (approximately the distance from Washington, D.C. to Philadelphia) is more than a mere inconvenience. An employee facing such a transfer as a result of sexual harassment would either be forced to endure the time and expense of a prolonged and arduous daily commute or else would have to uproot himself from his community to move to the new location. In this case, for example, the transfer forced Keeton to live separately from his wife. Any reasonable employee would find this situation to be a "materially adverse" change in the terms of his employment—and, thus, reasonable jurors should be entitled to find this to be the case.

Regardless of the merits of Petitioner's arguments, it is enough that the Sixth Circuit has already fully considered and

rejected them. This Court has recognized that liability under Title VII is necessarily a fact-dependent inquiry. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."). *Cf. White*, 126 S. Ct. at 2415-16. After fully considering Petitioner's arguments, the Sixth Circuit concluded that the unique facts of the case satisfy the standard set forth in both *Ellerth* and its own case law. The court has already denied *en banc* review, and there is no reasonable likelihood that it would reconsider its decision on remand. At most, Petitioner's argument amounts to a claim that the Sixth Circuit incorrectly applied its own precedent. The correct application of Sixth Circuit precedent, however, is a question for that court, not this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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